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## AN OVERVIEW OF ADMINISTRATIVE DUE PROCESS

### PART I\*

O. JOHN ROGGE†

#### I. INTRODUCTION

OVER THE PAST hundred years we have become administratively managed with increasing frequency and regularity. More and more we have been subjected to questioning by administrative and executive officials, while our lives have become more and more guided and controlled by the decisions of administrators.

More often than we realize, administrative or executive officials can require us, by means of a subpoena, to come before them and answer their inquiries as well as produce our records.<sup>1</sup> Administrative officials or agencies grant, renew, deny, revoke, or suspend the licenses that architects, auctioneers, barbers, hairdressers, manicurists, bartenders, chaffeurs, taxi and truck drivers, chiropractors, osteopaths, physical therapists, check cashers, dentists, dental hygienists, doctors, nurses, electricians, engineers, insurance agents, real estate brokers, stock brokers, junk dealers, landscapers, lawyers, masseurs, masseuses, money lenders, oculists, optometrists, peddlers, pharmacists, pilots, plumbers, podiatrists, private investigators, psychologists, social workers, surveyors, teachers, undertakers, veterinarians, weighmasters, and well drillers need to carry on their professions, businesses, occupations, or other activities. One needs a permit to build or occupy a house or other structure; to fish or to hunt; to operate a bingo parlor,

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\* This is the first of a two-part article. The second part will appear in the next issue of the *Villanova Law Review*.

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1. For a study of administrative inquiries, see Rogge, *Inquisitions by Officials: A Study of Due Process Requirements in Administrative Investigations*, (pts. 1-3), 47 MINN. L. REV. 939 (1963); 48 MINN. L. REV. 557, 1081 (1964).

a bus line, a dance hall, a ferry, a hotel or restaurant, a race track, or a theatre; or to run a beauty parlor, a bowling alley, a drugstore, a saloon, a shooting gallery, or a skating rink. With the exception of an unskilled laborer who is too old to drive an automobile, it is difficult to think of a person who has not at some point been faced with the need to obtain a license or a permit in order to function.

The grant, renewal, denial, revocation, or suspension of licenses or permits is, however, but one part of administrative action. Administrative officials hire, dismiss, and suspend teachers and other public employees. They take action with reference to students, regulate the lives of members of our armed forces, and classify the young men who register for the draft. Administrative officials act on the grant or denial of passports and visas. The treatment of prisoners, juvenile delinquents, and incompetents is in their hands. These officials determine who receives public housing, welfare assistance, social security benefits, medicaid and unemployment compensation, and in what amounts. They also allocate government subsidies and grants.

In addition to all these determinations which are made on a more or less case-by-case basis, administrative officials and agencies make rules which cover a multitude of situations. Professor Kenneth Culp Davis has characterized this procedure of administrative rule-making as "one of the greatest inventions of modern government."<sup>2</sup>

As the areas governed by administrative determinations increase, so should the efforts of the courts to extend the concept of due process — equal, even-handed, impartial justice under law, "fundamental fairness" to use the second Justice Harlan's phrase<sup>3</sup> — to administrative proceedings. Our courts should harness discretionary administrative powers, just as the courts of equity harnessed those powers in an earlier day,<sup>4</sup> and should protect the individual against unfairness, arbitrariness, favoritism, and discriminatory enforcement. Administrative officials and agencies, as well as the courts, should, like Caesar's wife, be above suspicion.

2. K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6.15, at 283 (Supp. 1970).

3. See, e.g., *Griffin v. California*, 380 U.S. 609, 615, 616 (1965) (Harlan, J., concurring); *Pointer v. Texas*, 380 U.S. 400, 408, 409 (1965) (Harlan, J., concurring). Justice Harlan used the phrase in colloquy with the writer the first time the writer argued *Rogers v. Bellei*, 401 U.S. 815 (1971).

4. One of the objections to equitable relief was that it was as variable as the "length of the chancellor's foot." John Selden (1584-1654), English jurist, antiquary, and chosen patron of the Selden Society, complained:

Equity is A Rogish thing, for Law wee have a measure, knowwhat to trust too: Equity is according to [the] Conscience of him [that] is Chancellor, and as [it] is larger or narrower soe is Equity. Tis all one as if they should make [the] Standard for [the] measure wee call A Foot, to be [the] Chancellor's Foot; what an uncertain measure would this be; One Chancellor ha's a long foot, another a short foot, a third an indifferent foot; tis [the] same thing in [the] Chancellor's

TABLE TALK OF JOHN SELDEN 43 (F. Pollock ed. 1890).

The requirements of due process will vary with different situations. If an individual's profession, livelihood, or liberty is at stake — if, for instance, a lawyer or other professional person is in danger of losing his license; or a public employee or tenured teacher is in danger of losing his job; or a person on parole is in danger of losing his liberty — due process will require charges, the right to counsel, a hearing, confrontation with one's accusers, the examination and cross-examination of witnesses, and a reasoned determination. On the other hand, if what is involved is a bar association's endorsement of a particular judicial candidate, the punishment of a prisoner for an infraction of prison regulations, termination of utility services, the payment of unemployment compensation, or the amount of a government subsidy, a simple hearing by a disinterested individual open to all parties may be sufficient.

## II. CONCEPT OF DUE PROCESS

The concept of due process has been continuously evolving for some eight centuries. One can date this development from 1178, when Henry II appointed five judges for the whole kingdom and told them "to do right judgment."<sup>5</sup> Sufficient legal development followed so that a generation later, when Henry II's son John misused his powers, the result was the Magna Charta and John was forced to promise his barons:

No freeman shall be taken or imprisoned or disseised or exiled, or in any way destroyed, nor will we go upon him, nor send upon him, except by the lawful judgment of his peers or [per legem terrae] by the law of the land.<sup>6</sup>

In the course of time the concept "law of the land" also came to mean due process of law. King John's successors confirmed and re-issued the Magna Charta, sometimes repeatedly. In 1354, Edward III (1327–1377), in addition to his frequent confirmations of the Magna Charta, further provided:

[N]o Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in answer [par due process de lei] by due Process of Law.<sup>7</sup>

5. 2 ENGLISH HISTORICAL DOCUMENTS 482 (D. Douglas & G. Greenway gen. ed. 1953). In the years 1176–1178, Henry II instituted a permanent court of professional judges. At first he divided the kingdom into six regions and appointed three judges for each region, but this proved too cumbersome. He then appointed five judges for the entire kingdom.

6. W. McKECHNIE, *MAGNA CHARTA* 375 (2d ed. 1914).

7. 28 *Edw. III* (1354) c. 1. Published by Villanova University Charles Widger School of Law Digital Repository, 1973

Thus the phrase "due process of law" came into being.

Coke equated the two: "[B]y the law of the land (that is, to speak it once for all) by the due course, and process of law."<sup>8</sup> In this country, we have made the same identification. Our earlier state constitutions usually used the phrase, "by the law of the land."<sup>9</sup> In *Trustees of Dartmouth College v. Woodward*,<sup>10</sup> Daniel Webster identified the law of the land provision in the New Hampshire Constitution with due process:

One prohibition is, "that no person shall be . . . deprived of his life, liberty, or estate, but by judgment of his peers, or the law of the land."

. . . .

. . . Have the plaintiffs lost their franchises by "due course and process of law?" . . . By the law of the land is most clearly intended the general law. . . . The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society.<sup>11</sup>

Similarly, the Supreme Court equated the due process clause with the law of the land in *Murray's Lessee v. Hoboken Land & Improvement Co.*,<sup>12</sup> its first major decision under the due process clause of the fifth amendment:

The words, "due process of law," were undoubtedly intended to convey the same meaning as the words, "by the law of the land," in *Magna Charta*. Lord Coke in his commentary on those words, (2 Inst. 50,) says they mean due process of law. The constitutions which have been adopted by the several States before the formation of the federal constitution, following the language

8. 2 INSTITUTES \*46. See also 2 *id.* at \*50. His reference in the latter place to 37 Edw. 3, c. 8 (1363) is to A Statute Concerning Diet and Apparel, 37 Edw. 3, c. 18 (1363).

9. See, e.g., DEL. CONST. art. 1, § 7 (1792) ("unless by the judgment of his peers or the law of the land"); ILL. CONST. art. VIII, § 8 (1818) ("but by the judgment of his peers or the law of the land"); MD. CONST. Declaration of Rights art. XXI (1776) ("by the judgment of his peers, or by the Law of the Land"); MASS. CONST. Declaration of Rights art. XII (1780) ("but by the judgment of his peers, or by the law of the land"); N.Y. CONST. art. VII, § 1 (1821) ("unless by the law of the land, or by the judgment of his peers"); N.C. CONST. Declaration of Rights § XII (1776) ("but by the law of the land"); PA. CONST. art. IX, § 9 (1790) ("unless by the judgment of his peers or the law of the land"); PA. CONST. Declaration of Rights § IX (1776) ("except by the laws of the land, or the judgment of his peers"); S.C. CONST. art. 41 (1778) ("but by the judgment of his peers or by the law of the land"); S.C. CONST. art. I, § 14 (1868) ("but by the judgment of his peers or the law of the land"); VT. CONST. ch. I, § 11 (1786) ("except by the laws of the land, or the judgment of his peers"); VA. CONST. Bill of Rights § 8 (1776) ("except by the law of the land or the judgment of his peers").

10. 17 U.S. (4 Wheat.) 518 (1819).

11. *Id.* at 561, 581 (argument for plaintiffs in error).

12. 58 U.S. (13 How.) 272 (1851).

of the great charter more closely, generally contained the words, "but by the judgment of his peers, or the law of the land."<sup>13</sup>

In the recent past, Justices Frankfurter and Harlan have given us apt statements of the due process concept. In *Bartkus v. Illinois*<sup>14</sup> Justice Frankfurter explained:

Decisions under the Due Process Clause require close and perceptive inquiry into fundamental principals of our society. The Anglo-American system of law is based not upon transcendental revelation but upon the conscience of society ascertained as best it may be by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment.<sup>15</sup>

In his concurring opinion in *Griffin v. Illinois*,<sup>16</sup> wherein the Court concluded that indigent defendants in state criminal cases were entitled to a free copy of the trial transcript where necessary to afford them as adequate an appellate review as those defendants able to buy transcripts, Justice Frankfurter stated:

"Due Process" is, perhaps, the least frozen concept of our law — the least confined to history and the most absorptive of powerful social standards of a progressive society.<sup>17</sup>

Justice Harlan thought due process to be fundamental fairness.<sup>18</sup> It is this concept that courts must increasingly apply to administrative proceedings.

13. *Id.* at 276. In *Twining v. New Jersey*, 211 U.S. 78 (1908), the Court, through Justice Moody, explained:

There are certain general principles well settled, however, which narrow the field of discussion and may serve as helps to correct conclusions. These principles grow out of the proposition universally accepted by American courts on the authority of Coke, that the words "due process of law" are equivalent in meaning to the words "law of the land," contained in . . . Magna Charta . . .

*Id.* at 100. In a yet later case, *Hebert v. Louisiana*, 272 U.S. 312 (1926), the Court said:

What it [due process clause] does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as "law of the land."

*Id.* at 316-17.

14. 359 U.S. 121 (1959).

15. *Id.* at 128.

16. 351 U.S. 12 (1956).

17. *Id.* at 20-21 (concurring opinion). In *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), in a concurring opinion in which Justice Harlan joined, Justice Frankfurter added:

The implications of the United States Constitution for national elections and "the concept of ordered liberty" implicit in the Due Process Clause of the Fourteenth Amendment as against the States . . . were not frozen as of 1789 or 1868, respectively. While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning.

*Id.* at 266 (citation omitted).

18. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 181 (1968) (Harlan, J., dis-

### III. ADMINISTRATIVE INVESTIGATIONS

In 1972 the attorney general of New York investigated the judging by the writer's clients of a contest that involved the number of words of four or more letters that could be made from the letters in a certain phrase.<sup>19</sup> During the course of the investigation, while the writer was present with one of his clients before two Assistant Attorneys General, Carl Kleinfeld and Eugene O'Brien, this interchange took place:

MR. KLEINFELD: Mr. Rogge, may I interrupt you, sir. This is an investigation by the Attorney General's Office. You are representing Mr. [Donald] Jagoda here as counsel. Your position in this office as counsel is limited to offering advice to Mr. Jagoda as to whether he can or cannot answer a question without incriminating himself. Other than that, your comments cannot be made in the course of this investigation unless you, yourself are sworn in as a witness.

MR. ROGGE: Now, let me make an objection here. Behind my back you have been in touch with my client. You have now asked him on the record to write you a letter.

MR. KLEINFELD: Sir, you are representing your client in this office. You do not represent him in a court matter. Mr. [Robert E.] Perin [yet another Assistant Attorney General] made it clear to you on an earlier date on the record that this was not a court proceeding and you do not have the ordinary rights of an attorney to be consulted separate and distinct from your client. We have an investigation in progress here and our contact is with the persons who are in the investigation. When you come into this office with your client, you have the right to sit with him and advise him whether a question put to you will or will not incriminate him and you have the right to tell him, therefore, not to answer the question on that basis. That is the limit, sir, of your . . .

MR. ROGGE: Let me advise you that my client is going to engage in no correspondence with this office. If you want him to come here and answer questions, fine. When you communicate by writing to him hereafter, you will do that, if you please, through me for I represent him.

MR. KLEINFELD: For the record, I will not do that because the Attorney General is under no obligation to deal with an attorney unless there is a court proceeding in process and at the moment there is no court proceeding. There is an investigation.

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19. The controversy reached the Supreme Court, New York County. *People v. Loew's Theatres, Inc.*, No. 41775/72 (Sup. Ct. N.Y. County, filed Sept. 13, 1972). A consent order and final judgment was signed on July 11, 1973, and filed in the Clerk's office on July 17, 1973.

MR. ROGGE: For your information, my client is instructed here and now to engage in no written communication with you other than to produce the documents you request and to answer the questions that you put to him.

MR. KLEINFELD: Mr. Rogge, at any time that your client wishes to give one of my letters to you and consult with you, he has the perfect right to do so.

MR. ROGGE: I furthermore think it's a breach of ethics for you to, behind my back, communicate with my client.

MR. O'BRIEN: Mr. Rogge, you've made your objection. It's on the record. Let's proceed.<sup>20</sup>

The writer's associate, Richard H. Rosenberg, was shocked; the writer was not. On the contrary, this seemed to be nearly, if not quite, normal for administrative investigations. In fact, the writer has the impression that when compared with the practices and procedures of other administrative officials and agencies of New York and other states, those of New York Attorney General Louis J. Lefkowitz are better than average.

Indeed, within the past two decades the Supreme Court, in two 5-4 decisions — *In re Groban*,<sup>21</sup> involving the secret inquisitorial proceedings of an Ohio fire marshal, and *Anonymous v. Baker*,<sup>22</sup> involving investigations of unethical practices of attorneys by a justice of the New York Supreme Court — sustained sentences of imprisonment although counsel had been excluded from the proceedings. It is a poignant commentary on our current inquisitorial trend that neither in England, where our accusatorial method had its early development, nor in France, where the inquisitorial technique took hold, is it considered proper for an official to question a person in secret and without counsel.<sup>23</sup>

Inquisitions by officials occur on the federal as well as the state level. On the federal level, however, the Administrative Procedure Act affords certain protections. For example, section 6(a) of that act provides that:

A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.<sup>24</sup>

20. Hearing of Feb. 8, 1972, at 17-20.

21. 352 U.S. 330 (1957).

22. 360 U.S. 287 (1959).

23. See Rogge, *supra* note 1, pt. 3, at 1085-88.

24. Administrative Procedure Act, § 6(a), 5 U.S.C. § 555(b) (1970).



There is nothing generally comparable to such protection on the state level. For example, of all the states which provide for inquisitions by officials in the case of suspicious fires, only Georgia specifically provides for the presence of counsel.<sup>25</sup> Even when counsel is permitted to accompany a witness, the attorney's role is usually very limited. Neither the Model State Administrative Procedure Act, approved by the National Conference of Commissioners on Uniform State Laws at its annual meeting in 1946, nor the Revised Model State Administrative Procedure Act, approved by the National Conference in the summer of 1961 contains a provision specifying that witnesses in investigative proceedings have the right to counsel.

In two recent cases, involving somewhat different circumstances, the Supreme Court has gone in seemingly opposite directions on the question of due process rights of a witness subpoenaed to appear before an administrative or executive official. In *Hannah v. Larche*,<sup>26</sup> the Court held that the rules of the Federal Civil Rights Commission, which denied the full right to counsel to a subpoenaed witness, did not violate the due process clause of the fifth amendment. Under the Civil Rights Act of 1957,<sup>27</sup> the Civil Rights Commission was required to hold its investigative hearings either before itself or, on its own authorization, before a "subcommittee of two or more members, at least one of whom shall be of each major political party."<sup>28</sup> In this instance, the statute limited the role of counsel for subpoenaed witnesses to that of "advising them concerning their constitutional rights."<sup>29</sup> Moreover, the statute gave the chairman or acting chairman of an investigative hearing the power to censure and exclude counsel for "breaches of order and decorum and unprofessional ethics."<sup>30</sup> The statute further provided that a witness could obtain a transcript of his testimony at an executive session only when authorized by the Commission.<sup>31</sup>

The Civil Rights Commission, acting under this legislation, subpoenaed several voting registrars and private citizens to a hearing at Shreveport, Louisiana. The subpoenaed witnesses sought to enjoin the Commission from holding its proposed hearing on the dual ground

25. GA. CODE ANN. § 92A-729 (1958).

26. 363 U.S. 420 (1960), *rev'd* 177 F. Supp. 816 (W.D. La. 1959).

27. Pub. L. No. 85-315, 71 Stat. 634 (1957), as amended, 42 U.S.C. § 1975 (1970).

28. Pub. L. No. 85-315, § 105(f), as amended § 1975d(f) (1970).

29. Pub. L. No. 85-315, § 102(c), 71 Stat. 634 (1957), as amended 42 U.S.C. § 1975a(c) (1970). Amendments in 1964 provided a fuller right to counsel.

30. Pub. L. No. 85-315, § 102(d), 71 Stat. 634 (1957), as amended 42 U.S.C. § 1975a(d) (1970). The section was amended to delete the disciplinary provision aimed at unruly counsel.

31. Pub. L. No. 85-315, § 102(i), 71 Stat. 635 (1957), as amended 42 U.S.C. § 1975a(i) (1970). The section was amended to permit the unrestricted sale of

that the Civil Rights Act of 1957 was unconstitutional and that the Commission's Rules of Procedure were invalid because they did not accord to those under investigation the rights of appraisal, confrontation, and cross-examination. A three-judge court held the act constitutional but the rules invalid;<sup>32</sup> the Supreme Court reversed, sustaining both the act and the rules.<sup>33</sup> In so doing, the Court approved the rules of the Federal Trade Commission and the Securities Exchange Commission, both of which contained restrictions on the right to counsel.<sup>34</sup>

The Court erroneously compared administrative investigations to grand jury investigations. Chief Justice Warren, speaking for the Court, stated that the comparison was made "to show that the rules of this Commission are not alien to those which have historically governed the procedure of investigations conducted by agencies in the three major branches of our Government."<sup>35</sup> Justice Douglas, however, in a dissenting opinion in which Justice Black concurred, pointed out the difference between a grand jury and the Commission:

The grand jury brings suspects before neighbors, not strangers.

...

This Commission has no such guarantees of fairness. Its members are not drawn from the neighborhood. The members cannot be as independent as grand juries because they meet not for one occasion only; they do a continuing job for the executive and, if history is a guide, tend to acquire a vested interest in that role.

....

The Civil Rights Commission can hold all the hearings it desires; it can adduce testimony from as many people as it likes; it can search the records and archives for such information it needs to make an informed report to Congress. But when it summons a person, accused under affidavit of having violated the federal election law, to see if the charge is true, it acts in lieu either of a grand jury or of a committing magistrate. The sifting of criminal charges against people is for the grand jury or for judges or magistrates and for them alone under our Constitution. In my view no other accusatory body can be used that withholds the rights of confrontation and cross-examination from those accused of federal crimes.<sup>36</sup>

During oral argument before the Court, Justice Black also emphasized the difference between a grand jury and the Commission: "Do

32. *Larche v. Hannah*, 177 F. Supp. 816 (W.D. La. 1959).

33. *Hannah v. Larche*, 363 U.S. 420 (1960).

34. *Id.* at 446.

35. *Id.* at 449.

36. *Id.* at 498-99, 508 (citations omitted).

you think it [an investigation by the Commission] is the same as the work of a grand jury made up of people living in the community? They sift out the charges to be preferred."<sup>37</sup> When Deputy Attorney General Lawrence E. Walsh pressed the grand jury analogy, Justice Black responded: "Again I suggest a difference between investigation by a grand jury composed of persons from the community and an investigation by this Commission."<sup>38</sup>

Seemingly contrary to the result in *Hannah*, the Court in *Jenkins v. McKeithen*<sup>39</sup> held that it was error to dismiss a complaint which challenged the procedure of a Louisiana body called the Labor-Management Commission of Inquiry as violating the due process and equal protection clauses of the fourteenth amendment. Justice Marshall, announcing the judgment of the Court in an opinion in which Chief Justice Warren and Justice Brennan joined, stated that the Louisiana Act "was drafted with *Hannah* in mind and the structure and powers of the Commission here are similar to those of the Civil Rights Commission."<sup>40</sup> The Louisiana Act provided that a witness had the right to the presence and advice of counsel, "subject to such reasonable limitations as the commission may impose in order to prevent obstruction of or interference with the orderly conduct of the hearing."<sup>41</sup> Apparently the biggest difference between the two bodies was that the findings of the Federal Civil Rights Commission were to be used for legislative purposes, whereas the findings of the Labor-Management Commission of Inquiry of Louisiana were for the purpose of exposing violation of criminal laws by specific individuals. Despite the fact that the Louisiana Act accorded certain rights to a witness, including the right to counsel, Justice Marshall nevertheless stated in his opinion

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37. 28 U.S.L.W. 3222 (1960).

38. *Id.* It should be noted that even in the case of grand juries, counsel for witnesses have been asking for rights which have not been accorded them in the past. Indeed, in the case of a grand jury witness at whom an accusing finger has been pointed, counsel might argue for an extension of the right to counsel to the grand jury room. Counsel can suggest that if in France an accused person has the right to counsel whenever the *juge d'instruction* questions him, see Rogge, *supra* note 1, pt. 3, at 1087-88, then by a parity of reasoning an accused person in this country before a grand jury should have a like right. Yet, our courts have refused to go that far. *United States v. Rosen*, 353 F.2d 523 (2d Cir. 1965), *cert. denied*, 383 U.S. 908 (1966); *United States v. Scully*, 225 F.2d 113, 116 (2d Cir. 1955), *cert. denied*, 350 U.S. 897 (1955); *United States v. Kane*, 243 F. Supp. 746 (S.D.N.Y. 1965). *Cf.* *United States v. Winter*, 348 F.2d 204 (2d Cir. 1965). However, four of the eleven judges of the District of Columbia Circuit, sitting en banc in *Jones v. United States*, 342 F.2d 863 (D.C. Cir. 1964) (Senior Circuit Judge Edgerton, Chief Judge Bazelon, and Circuit Judges Fahy and Wright) would have ordered the dismissal of an indictment based on an accused's answers to questions, given without the benefit of counsel, before the grand jury which returned it.

39. 395 U.S. 411 (1969), *rev'g* 286 F. Supp. 537 (E.D. La. 1968).

40. *Id.* at 425.

41. Act 2 of 1967, 1st Ex. Sess., §§ 1-18 (repealed 1972).

"that due process requires the Commission to afford a person being investigated the right to confront and cross-examine the witnesses against him, subject only to traditional limitations on those rights."<sup>42</sup>

Subsequently, the Third Circuit considered the interrelationship of *Hannah* and *Jenkins* in *United States ex rel. Catena v. Elias*,<sup>43</sup> when ruling on the constitutionality of the statute creating the New Jersey State Commission of Investigation. The witness contended that the statute, both on its face and as applied, violated the due process clause of the fourteenth amendment for failure to provide minimal due process safeguards for those appearing before the Commission. The Third Circuit considered the question in terms of whether the New Jersey statute created a body which was investigatory and thus within *Hannah*, or adjudicatory or accusatory and thus within *Jenkins*.<sup>44</sup>

Section 11 of the New Jersey Act provided:

By such means and to such extent as it shall deem appropriate, the commission shall keep the public informed as to the operations of organized crime, problems of criminal law enforcement in the State and other activities of the commission.<sup>45</sup>

42. 395 U.S. at 429. Justices Douglas and Black concurred in the result for the reasons stated in the former's dissenting opinion in *Hannah*.

In an earlier case, *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951), the Court indicated that President Truman's Loyalty Order, Exec. Order No. 9835, 3 C.F.R. 627 (1957), did not, without more, authorize the attorney general to submit a designated list of subversive organizations to the Loyalty Review Board of the Civil Service Commission. Though there was no opinion for the Court, Justice Frankfurter in his concurring opinion wrote:

Due process is not confined in its scope to the particular forms in which rights have heretofore been found to have been curtailed for want of procedural fairness. Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances.

341 U.S. at 173-74.

Justice Douglas in his concurring opinion added:

It is not enough to know that the men applying the standard are honorable and devoted men. This is a government of *laws*, not of *men*. . . .

Notice and opportunity to be heard are fundamental to due process of law. *Id.* at 177-78.

43. 465 F.2d 765 (3d Cir. 1972). Earlier in the same case the Third Circuit had held that the use immunity provision in the New Jersey Act violated the fifth amendment provision against self-incrimination. 449 F.2d 40 (3d Cir. 1971). However, the Supreme Court reached a contrary conclusion in *Zicarelli v. New Jersey Investigating Comm'n*, 406 U.S. 472 (1972), and reversed the Third Circuit's judgment. 406 U.S. 952 (1972). It was on remand that the Third Circuit considered the due process claims.

44. After reviewing *Hannah* and *Jenkins*, the court stated:

The thrust of these decisions is that the requirements of due process vary with the type of proceeding involved. Fewer procedural safeguards are required by the due process clause in hearings before purely investigative agencies or agencies conducting purely investigative hearings. But when an agency is adjudicatory or accusatory in the sense that it is used to find named individuals guilty of crimes or to make similar determinations finally and directly affecting substantial personal interests, the due process clause requires the full panoply of procedural safeguards traditionally required in adjudicatory proceedings.

465 F.2d at 768 (footnote omitted).

45. N.J. STAT. ANN. § 52:9M-11 (1970).

Witnesses summoned to testify before the Commission had the right to be accompanied by counsel, who was to be permitted to advise the witness of his rights. However, that right to advise was "subject to reasonable limitations to prevent obstruction of or interference with the orderly conduct of the hearing."<sup>46</sup> At public hearings, counsel for a witness could submit proposed questions to be asked of the witness relevant to the matters upon which the witness had been questioned, but the Commission was only required to ask the witness "such of the questions as it may [have] deem[ed] appropriate to its inquiry."<sup>47</sup> A witness had no right to either cross-examine other witnesses or to call witnesses, although he could file a sworn statement relative to his testimony for incorporation into the record at the conclusion of his examination.<sup>48</sup>

Section 11 would thus appear to make the New Jersey Commission accusatorial and, thus, invalid under *Jenkins*. However, the Supreme Court of New Jersey, in *In re Zicarelli*,<sup>49</sup> had held that the Commission was an investigatory body with no power to make and publicize findings with respect to the guilt of specific individuals. The Third Circuit considered itself bound by the New Jersey Court's construction of the statute and sustained, under *Hannah*, the procedures of the Commission:

Since the Commission has a purely investigative character and purpose, the due process clause does not require the full panoply of judicial procedures in hearings before the Commission. We conclude that the procedures of the Commission, which so closely parallel the procedures of the Civil Rights Commission upheld in *Hannah*, comport with the requirements of due process.<sup>50</sup>

The Organized Crime Control Act of 1970 (Crime Control Act)<sup>51</sup> extended the right of inquisitorial investigation to the Attorney General of the United States and to a body called a "special grand jury" — a body which is more like the Louisiana Labor-Management

46. *Id.* § 52:13E-3.

47. *Id.*

48. *Id.* § 52:13E-5.

49. 55 N.J. 249, 261 A.2d 129 (1970), *aff'd sub nom.* *Zicarelli v. New Jersey Invest. Comm'n*, 406 U.S. 472 (1972).

50. *Id.* at 769-70. Subsequently, the Supreme Court of New Jersey held that the State Commission of Investigation could force witnesses to testify at public hearings. *Cali v. New Jersey State Comm'n of Invest.*, 63 N.J. 310, 307 A.2d 90 (1973).

In *In re Letters of Request to Examine Witnesses from the Court of Queen's Bench*, \_\_\_\_ F. Supp. \_\_\_\_ (N.D. Cal. 1973), the court held that 28 U.S.C. § 1782 (1970), did not authorize federal district courts to compel testimony for use by a Canadian commission of inquiry conducting an investigation unrelated to a judicial or quasi-judicial inquiry. *Id.* at \_\_\_\_.

51. Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified in scattered sections of 18 U.S.C.).



the court for filing as a public record a report which censured and castigated public officials for their conduct in office. The dissenting congressmen quoted from the opinion:

In the public mind, accusation by report is indistinguishable from accusation by indictment and subjects those against whom it is directed to the same public condemnation and opprobrium as if they had been indicted.<sup>58</sup>

They concluded that the special grand jury device deprived "both the innocent and the 'guilty' of basic rights of due process," and that there was no need to "corrupt civil liberties in order to combat corruption in public office."<sup>59</sup> It is suggested that counsel consider the points made by the dissenting congressmen and begin any attacks on the special grand juries authorized under the Crime Control Act by arguing *Jenkins*.

The writer made a study of administrative inquiries and concluded that a witness subpoenaed to appear before an administrative or executive official should be accorded certain rights as a matter of due process. Assistance of counsel should not be limited to ear-whispering. The witness should be apprised of the nature of the inquiry as well as the subject matter about which he is to be questioned. He should be provided with a copy of his testimony and of any documentary material he supplies, and he should be afforded immunity from prosecution unless, with full understanding, he waives his privilege against self-incrimination.<sup>60</sup> It is this writer's opinion that *In re Groban*<sup>61</sup> and *Anonymous v. Baker*<sup>62</sup> should be overruled on due process grounds as unceremoniously as was *Betts v. Brady*.<sup>63</sup>

In suggesting these due process rights, the writer has no thought of curbing or reversing the current inquisitorial trend. If the way of the future is inquisition by officials, so be it. Nor is there in this suggestion any demand for confrontation and cross-examination in all situations. Administrative investigations should be sweeping if necessary, and should be allowed to proceed in a truly unhampered, expeditious, and effective manner. However, the rights of individuals subpoenaed to appear before executive or administrative investigators should be protected by the due process clauses, a protection comparable

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58. H.R. REP. No. 91-1549, *supra* note 53, at 183 (dissenting views), quoting 9 N.Y.2d at 154, 173 N.E.2d at 26, 212 N.Y.S.2d at 39.

59. H.R. REP. No. 1549, *supra* note 53, at 184 (dissenting views).

60. See Rogge, *supra* note 1.

61. 352 U.S. 330 (1957). See notes 21-23 and accompanying text *supra*.

62. 360 U.S. 287 (1959). See notes 22-23 and accompanying text *supra*.

63. 316 U.S. 455 (1942). *Betts v. Brady* was overruled in *Gideon v. Wainwright*, 372 U.S. 335 (1963) (defendants in criminal cases guaranteed assistance of counsel as a fundamental right essential to a fair trial).

to that which existed when grand juries were the accusers and our officials did not have inquisitional powers.

#### IV. ADMINISTRATIVE DETERMINATIONS<sup>64</sup>

##### A. Licenses and Permits

Nothing is more ubiquitous in the lives of many of us than the need for a license or a permit. Court cases extending due process concepts to administrative proceedings involving the grant, renewal, denial, revocation, or suspension of such documents are becoming legion.

In *Willner v. Committee on Character & Fitness*,<sup>65</sup> an unsuccessful applicant for admission to the bar alleged that the Committee on Character and Fitness never afforded him an opportunity to confront and cross-examine those who had spoken ill of him to members of the Committee. The Supreme Court, in an opinion by Justice Douglas, held that he was denied due process:

We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood. . . . That view has been taken by several state courts when it comes to procedural due process and the admission to practice law. . . . We think the need for confrontation is a necessary conclusion from the requirements of procedural due process in a situation such as this.<sup>66</sup>

*In re Ruffalo*<sup>67</sup> involved suspension from the Ohio bar. Ruffalo, active in the trial of Federal Employers' Liability Act (FELA) cases, had hired a railroad man, a night-shift car inspector, to investigate the cases. The Ohio Board of Commissioners on Grievances and Discipline charged Ruffalo with using his investigator to solicit clients. After hearing the testimony, a new charge, hiring the railroad

64. In the following sections agency action and the courts' reaction will be examined in 31 areas. While the treatment is not exhaustive, it is hoped that it will give the reader an appreciation of the grounds upon which specific agency determinations may be challenged.

65. 373 U.S. 96 (1963).

The writer has included licenses to practice law, for such licenses depend upon the action of admissions, character and fitness, or grievances committees whose members, although lawyers, play the role of administrative officials.

66. *Id.* at 103-04 (citations omitted).

67. 390 U.S. 544 (1968). *Accord*, *Nell v. United States*, 450 F.2d 1090 (4th Cir. 1971); *Committee on Professional Ethics & Grievances v. Johnson*, 447 F.2d 169 (3rd Cir. 1971). In *Taylor v. Kentucky State Bar Ass'n*, 424 F.2d 478 (6th Cir. 1970), the Sixth Circuit held that a complaint which alleged that the Kentucky State Bar Association instituted a grievance procedure against Daniel T. Taylor, III, in bad faith as an instrument for the suppression of first amendment activities, stated a good claim for civil rights relief under 28 U.S.C. § 1343 (1970) and 42 U.S.C. § 1983 (1970). Taylor is a criminal lawyer who defends controversial clients, among whom are civil rights activists.



man to investigate the railroad man's own employer, was added. On the basis of that charge and another, Ruffalo was disbarred. The Supreme Court, again in an opinion by Justice Douglas, held that Ruffalo was denied due process, stating:

How the charge would have been met had it been originally included in those leveled against petitioner by the Ohio Board of Commissioners on Grievances and Discipline no one knows.

This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process.<sup>68</sup>

There is a cognate line of cases involving denial of admission to the bar because of an applicant's beliefs or affiliations. Justice Black, in his opinion in *Baird v. State Bar of Arizona*,<sup>69</sup> commenting on a number of those decisions, stated:

With sharp divisions in this Court, our docket and those of the Courts of Appeals have been filled for years with litigation involving inquisitions about beliefs and associations and refusals to let people practice law and hold public or even private jobs solely because public authorities have been suspicious of their ideas.<sup>70</sup>

In *Baird* the petitioner listed for the Arizona Bar Committee all the organizations with which she had been associated since she reached 16 years of age, but declined to state whether she had been a member of the Communist Party or any organization "that advocate[d] overthrow of the United States Government by force or violence."<sup>71</sup> The Court, in a 5-4 decision, found the question too broad. Although there was no opinion for the Court, Justice Black, in an opinion in which Justices Douglas, Brennan, and Marshall joined, wrote that, consistent with the first amendment, "a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes."<sup>72</sup> Justice Stewart concurred on the ground "that such inquiry must be confined to knowing membership to satisfy the First and Fourteenth Amendments."<sup>73</sup>

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68. 390 U.S. at 551-52.

69. 401 U.S. 1 (1971).

70. *Id.* at 3 (footnotes omitted).

71. *Id.* at 4-5.

72. *Id.* at 7.

73. *Id.* at 9.

On the same day, in *In re Stolar*,<sup>74</sup> the Court reached a similar result with reference to an application for admission to the Ohio bar. Justice Black commented in his opinion:

The central question in [these cases] has been the same, whether involving lawyers, doctors, marine workers, or State or Federal Government employees, namely: to what extent does the First or Fifth Amendment or other constitutional provision protect persons against governmental intrusion and invasion into private beliefs and views that have not ripened into any punishable conduct? . . . [W]e hold that Stolar's refusals to answer certain questions asked him by the Ohio Bar Committee were . . . protected by the First Amendment.<sup>75</sup>

However, on the same date, in *Law Students Civil Rights Research Council v. Wadmond*,<sup>76</sup> the Court sustained the system of screening applicants for admission to the New York Bar. Under New York law, the Appellate Divisions had to be satisfied that an applicant for admission to the bar "possesse[d] the character and general fitness requisite for an attorney and counsellor-at-law."<sup>77</sup> The appellants challenged the New York system "primarily on First Amendment vagueness and overbreadth grounds."<sup>78</sup> The Court, in a 5-4 decision with Justices Black, Douglas, Marshall, and Brennan dissenting, held against them.

Two recent decisions,<sup>79</sup> one by the Court of Appeals for the District of Columbia Circuit and the other by the Supreme Court of

74. 401 U.S. 23 (1971).

75. *Id.* at 24-25.

76. 401 U.S. 154 (1971).

77. N.Y. JUDICIARY LAW § 90(1)(a) (McKinney 1968). Pursuant to N.Y. Civ. PRAC. Rule 9401 (McKinney 1963) the appellate division in each of the four judicial departments appoints a committee of not less than three practicing lawyers from each judicial district within the department for the purpose of investigating the character and fitness of every applicant. N.Y. Civ. PRAC. Rule 9404 (McKinney Supp. 1972) provides that "no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission."

78. 401 U.S. at 157. Reasonable certainty is a general due process requirement for all legislation, whether federal or state, whether civil or criminal; for federal legislation under the due process clause of the fifth amendment, and for state legislation under the due process clause of the fourteenth. For example, in *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), the Court, in an opinion by Justice Black, stated:

It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.

*Id.* at 402-03. See also Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

79. *Sellars v. Committee on Admissions*, 409 U.S. 1060 (1972), denying cert. to \_\_\_\_ A.2d \_\_\_\_ (D.C. App. 1972); *In re Schatz*, 80 Wash. 2d 604, 497 P.2d 153 (1972). *Contra*, *Rossiter v. Law Comm.*, \_\_\_\_ F. Supp. \_\_\_\_ (D. Colo. 1973) (failure of Colorado civil procedure rule to provide applicant with an opportunity to demonstrate that his school complies with American Bar Association standards deprives

the State of Washington, sanctioned rules that limited eligibility to take bar examinations to graduates of law schools approved by the American Bar Association. Justice Hale of the Washington Supreme Court argued in a dissenting opinion that the Washington State Bar Association had surrendered its delegated powers to accredit or disqualify law schools to the American Bar Association, a wholly private organization.<sup>80</sup>

Other professional bodies have developed procedures in their admissions and disciplinary rulings that are somewhat comparable to those of bar associations. The case of *Mack v. Florida State Board of Dentistry*<sup>81</sup> furnishes a good illustration of the application of the due process concept to an administrative hearing. After his license to practice had been revoked by the Florida State Board of Dentistry, Dr. Mack sought judicial review in the state courts where he urged, without success, that the procedure before the Dental Board deprived him of a fair and impartial trial.<sup>82</sup> He did not, at that point, seek Supreme Court review, but instead sought civil rights relief in the federal district court.<sup>83</sup> He argued that the proceedings before the state board were unconstitutional in that the board acted as both prosecutor and judge and, further, that the charges against him were not proved beyond a reasonable doubt. The district court held in his favor on the former, although not the latter ground.<sup>84</sup> On appeal, the Fifth Circuit rejected both of Dr. Mack's arguments, but nevertheless held in his favor on the ground that his administrative hearing was not a hearing in the true sense of the word:

To get down to brass tacks, this was not a hearing. It was an ungoverned confrontation. We hold that Dr. Mack, as a matter of fact, has not had a hearing in that sense required of anything which claims to be an administrative hearing as known to the jurisprudence of this Country.

In so holding, we imply no affirmative criticism of the Board members. They were not lawyers. Their mistake was in not selecting some competent attorney as a presiding officer, preferably acceptable to both sides, who could have kept the hearing within due bounds while the Board Members heard the evidence.

80. 80 Wash. 2d at 611, 497 P.2d at 157. In *In re Griffiths*, 93 S. Ct. 2851 (1973), the Court held that Connecticut's exclusion of resident aliens from the practice of law violated the fourteenth amendment's equal protection clause.

81. 430 F.2d 862 (5th Cir. 1970), *cert. denied*, 401 U.S. 954, 960 (1971), *aff'g in part, and vacating and remanding in part*, 296 F. Supp. 1259 (S.D. Fla. 1969).

82. *Mack v. Pepper*, 192 So. 2d 66, 67 (Fla. Dist. Ct. App. 1966), *cert. denied*, 201 So. 2d 551 (Fla. 1967).

83. Relief was sought pursuant to 42 U.S.C. § 1983 (1970).

84. 296 F. Supp. at 1268.

We do not intimate that such a procedure is Constitutionally required. We suggest it only as one way by which this situation may be avoided a second time around. Neither do we insinuate that administrative hearings must be conducted with all the formalities and strictures of a criminal case. They do not. A man who is about to lose a professional license which he has held for twenty years, however, is entitled to develop his defense in freedom from what took place in this case.<sup>85</sup>

Although both sides petitioned for certiorari, it was denied.<sup>86</sup>

In another illustrative case, *Berryhill v. Gibson*,<sup>87</sup> the plaintiffs, optometrists licensed to practice in Alabama, challenged the constitutionality and sought to restrain the enforcement of an Alabama statute pursuant to which the Alabama Optometric Association sought suspension of their licenses. The plaintiffs worked for a firm that issued over 75,000 eyeglasses in one year, and those who were to judge the question of suspension presumably would have shared in that business if the plaintiffs' activities had been suspended. A three-judge district court granted relief, stating:

The question of possible bias of the Board members in this case is not whether the members are actually biased but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him. A basic

85. 420 F.2d at 846.

86. 401 U.S. 954, 960 (1971). In the case of the Florida State Board of Dentistry's petition, Justice White, in a dissent in which Chief Justice Burger joined, wrote:

Whether § 1983 is to serve as the analogue to habeas corpus in civil cases displacing the usual rules of finality seems an important and timely issue having serious state-federal implications. Accordingly, I dissent from the denial of certiorari in this case.

401 U.S. at 961-62 (citations omitted).

87. 331 F. Supp. 122 (M.D. Ala. 1971), *vacated and remanded*, 411 U.S. 564 (1973). There were other cases involving professional licenses on the Court's 1972-1973 docket. *Cooper v. Florida State Bd. of Dentistry*, 267 So. 2d 830 (Fla. Sup. Ct. 1972), *cert. denied*, 410 U.S. 927 (1973), 265 So. 2d 432, 267 So. 2d 831 (Fla. Dist. Ct. App. 3d Dist. 1972), *cert. denied*, 410 U.S. 930 (1973) (dentist); *In re Gross*, 503 P.2d 995 (Mont. 1972), *cert. denied*, 410 U.S. 991 (1973) (attorney); *Moore v. Board of Trustees of Carson-Tahoe Hosp.*, 88 Nev. Adv. Op. 55, 495 P.2d 605, *cert. denied*, 409 U.S. 879 (1972) (physician); *Martinez v. Texas State Bd.*, 476 S.W.2d 400 (Tex. Ct. Civ. App. 4th Sup. Jud. Dist.), *appeal dismissed for want of a substantial federal question*, 409 U.S. 1020 (1972) (physician); *Trimble v. Texas State Bd. of Registration*, 483 S.W.2d 275 (Tex. Ct. Civ. App. 1972), *cert. denied*, 412 U.S. 920 (1973).

In *In re Ming*, 469 F.2d 1362 (7th Cir. 1972), the Seventh Circuit held that the failure to afford an attorney a hearing prior to the issuance of an order of suspension based on a misdemeanor conviction violated due process.

The California Supreme Court, in *Patty v. Board of Medical Examiners*, 9 Cal. 3d 356, 508 P.2d 1131, 107 Cal. Rptr. 473 (1973), concluded that the defense of entrapment had to be available in administrative proceedings at which revocation or suspension of a license to practice a profession or business was at issue.

The Louisiana Supreme Court, in *Louisiana State Bar Ass'n v. Ehmgig*, — La. —, — So. 2d — (1973), ruled that article 15, section 8 of the Louisiana State Constitution, which prohibited the summary suspension of an attorney convicted of a "serious crime," violated due process.

element of justice in America is that the court must avoid, not only evil but, the appearance thereof.<sup>88</sup>

The court quoted at length from the opinion of the Supreme Court in *In re Murchinson*.<sup>89</sup>

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law."<sup>90</sup>

The Supreme Court affirmed the conclusion of the district court but vacated its judgment and remanded the case for reconsideration in the light of two judgments of the Alabama Supreme Court favorable to the plaintiffs' position.<sup>91</sup>

The most common licenses are those for the operation of motor vehicles. Various provisions governing their suspension or revocation have been established by the states. *Bell v. Burson*<sup>92</sup> involved a Georgia provision which provided that the motor vehicle registration and driver's license of an uninsured motorist involved in an accident was to be suspended unless he posted security to cover the amount of damages claimed by the aggrieved parties.<sup>93</sup> The administrative hearing conducted prior to the suspension excluded consideration of the motorist's fault. The Supreme Court, relying on *Sniadach v. Family*

88. 331 F. Supp. at 125.

89. 349 U.S. 133 (1955).

90. 331 F. Supp. at 125-26, quoting *In re Murchinson*, 349 U.S. 133, 136 (1955) (citation omitted). The Court distinguished the *Younger v. Harris*, 401 U.S. 37 (1971), line of cases on the ground that "revocation of the license of a professional man to practice his profession, together with the attendant publicity which would inevitably be associated therewith, would cause irreparable damage to the Plaintiffs." *Id.* at 126.

91. *Lee Optical Co. v. Board of Optometry*, 288 Ala. 338, 261 So. 2d 17 (1972); *House of \$8.50 Eyeglasses v. Board of Optometry*, 288 Ala. 349, 261 So. 2d 27 (1972).

In *State ex rel. Bowen v. Flowers*, \_\_\_\_ W. Va. \_\_\_\_, 184 S.E.2d 611 (1971), a pharmacist who qualified for participation in medical pharmaceutical programs administered by the Department of Welfare of the State of West Virginia obtained a writ of mandamus to compel the Commissioner of the Department of Welfare to give him a hearing before suspending him from participation in the programs. The court pointed out "that due process of law extends to the actions of administrative officers as well as the judicial branch of the government." *Id.* at \_\_\_\_, 184 S.E.2d at 614.

92. 402 U.S. 535 (1971).

93. GA. CODE ANN. § 92A-605(a) (Supp. 1970).

*Finance Corp.*<sup>94</sup> and *Goldberg v. Kelly*<sup>95</sup> invalidated the Georgia scheme. The Court stated that, if a state issued licenses, those licenses could not be revoked without that procedural due process required by the fourteenth amendment. The flaw in the Georgia scheme was that it did not provide "a forum for the determination of the question whether there [was] a reasonable possibility of a judgment being rendered against [the petitioner] as a result of the accident."<sup>96</sup>

*Bell* has been applied in a number of cases.<sup>97</sup> In one of these, *Pratt v. Kaye*,<sup>98</sup> the federal district court held that the fifth amendment and the Administrative Procedure Act barred the director of the District of Columbia Bureau of Motor Safety from terminating, for medical reasons, the license of a driver of a private motor carrier without first giving the driver an impartial and fair hearing. In another case, *Reese v. Kassab*,<sup>99</sup> a three-judge district court gave a truck driver relief from a Pennsylvania statute that provided a system of assessing "points" by the Secretary of the Department of Transportation upon receipt of notification of convictions of certain specified violations of the Motor Vehicle Code. Under the Pennsylvania scheme, a driver received notice of the imposition of the points on each occasion, and, when a total of 11 points was accumulated, his operator's license was to be suspended for a period of 60 days. No administrative hearing was provided, either upon each assessment of points or before suspension. The court held the Pennsylvania point system violative of due process because of the lack of notice and opportunity for hearing before the suspension became effective.<sup>100</sup>

Liquor licenses have also given rise to their share of court cases. The leading case, and one which courts, including the Supreme Court, have followed or cited with approval is *Hornsby v. Allen*.<sup>101</sup> Mrs. Hornsby was an unsuccessful applicant for a license to operate a retail liquor store in Atlanta, Georgia. She sought relief under the Civil

94. 395 U.S. 337 (1969).

95. 397 U.S. 254 (1970).

96. 402 U.S. at 542.

97. *Holland v. Parker*, 354 F. Supp. 196 (D.S.D. 1973); *Weaver v. O'Grady*, 350 F. Supp. 403 (S.D. Ohio 1972); *McNamara v. Malloy*, 337 F. Supp. 732 (D. Vt. 1971); *Reese v. Kassab*, 334 F. Supp. 744 (W.D. Pa. 1971); *Pratt v. Kaye*, \_\_\_\_ F. Supp. \_\_\_\_ (D.D.C. 1971); *Rios v. Cozens*, 7 Cal. 3d 792, 499 P.2d 979, 103 Cal. Rptr. 299 (1972), *vacated and remanded sub nom.* Department of Motor Vehicles v. Rios, 410 U.S. 425 (1973). In *Sandoval v. Hecker*, 350 F. Supp. 127 (D. Colo. 1972), and *Christenson v. Campbell*, 347 F. Supp. 82 (D. Ariz. 1972), the courts sustained the provisions of the Colorado and Arizona statutes respectively.

98. \_\_\_\_ F. Supp. \_\_\_\_ (D.D.C. 1971).

99. 344 F. Supp. 744 (W.D. Pa. 1971), *petition for cert. filed sub nom.* Kassab v. Trombetta, 42 U.S.L.W. 3159 (U.S. Aug. 11, 1973) (No. 73-286).

100. *Id.* at 747.

101. 326 U.S. 245 (1945), *aff'd*, 361 U.S. 143 (1960). *Goldberg v. Kelly*, 397 U.S. 254, 262 n.9 (1970).

Rights Act,<sup>102</sup> alleging that, although she met all the requirements and qualifications, she was denied a license because of a system of ward courtesy under which licenses were granted only upon the approval of one or both of the aldermen of the ward in which the store was to be located. The Fifth Circuit granted relief, reasoning that since licensing procedures involve the determination of certain facts and the application of legal criteria to them, basically a judicial process, the fundamental requirements of due process must be met. The court stated that due process in administrative proceedings of a judicial nature was generally considered to require conformity to the fair practices of Anglo-Saxon jurisprudence which it noted usually meant adequate notice and a fair hearing.<sup>103</sup> In Mrs. Hornsby's case, the public interest made the observation of those requirements even more imperative:

If one applicant for a license is preferred over another equally qualified as a political favor or as the result of a clandestine arrangement, the disappointed applicant is injured, but the injury to the public is much greater. The public has the right to expect its officers to observe prescribed standards and to make adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse.<sup>104</sup>

Various other liquor regulation cases have recently been in the courts. *California v. LaRue*<sup>105</sup> involved a challenge to regulations of the California Department of Alcoholic Beverage Control which prohibited nude sexual entertainment, either live or on films, in bars and other establishments licensed to dispense liquor by the drink. While a three-judge district court held the regulations invalid under the first and fourteenth amendments, the Supreme Court reversed, holding that the regulations were a valid exercise of the state's authority to regulate the distribution and sale of liquor under the twenty-first amendment. Addressing the regulations themselves, the Court stated:

102. 42 U.S.C. § 1983 (1970).

103. 326 F.2d at 608.

104. *Id.* at 609-10. The court was also prepared to give injunctive relief if necessary. *Id.* at 612.

Whether the federal courts could give civil rights relief where "property" rights, as opposed to "personal" rights, were involved and whether they could do so by way of injunction, were long open questions. Both questions have now been settled. In *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972), the Court concluded "that the dichotomy between personal liberties and property rights" as a delineation of the Court's ability to grant civil rights relief was a false one. *Id.* at 552. In *Mitchum v. Foster*, 407 U.S. 225 (1972), the Court took the further step and held that the Civil Rights Act, 42 U.S.C. § 1983 (1970), was within the "expressly authorized" exception of the anti-injunction statute, 28 U.S.C. § 2283 (1970).

105. 409 U.S. 109 (1972), 177 F. Supp. 348 (C.D. Cal. 1971).

A common element in the regulations struck down by the District Court appears to be the Department's conclusion that the sale of liquor by the drink and lewd or naked dancing and entertainment should not take place simultaneously in bars and cocktail lounges for which it has licensing responsibility. Based on the evidence from the hearings which it cited to the District Court, and mindful of the principle that in legislative rulemaking the agency may reason from the particular to the general . . . we do not think it can be said that the Department's conclusion in this respect was an irrational one.<sup>106</sup>

Other states have also tried to prevent nude entertainment in bars. Wisconsin was one, but Wisconsin, instead of adopting general rules and regulations after hearings, provided only for legislative type hearings by municipalities on a case-by-case basis, "wherein one is given notice of the hearing and a fair opportunity to state his position."<sup>107</sup> The hearing did not necessarily include the right to cross-examination or the requirement that testimony be given under oath.<sup>108</sup> A three-judge district court, in *Misurelli v. City of Racine*,<sup>109</sup> a civil rights suit, struck down the Wisconsin provisions "insofar as they permit[ted] renewal of liquor licenses to be denied [while] not permitting the applicants an opportunity for an adversary type hearing in which the applicant is given timely notice of the reasons urged for denial and an opportunity to present, confront and cross-examine witnesses under oath with a verbatim transcript . . . ."<sup>110</sup> However, in a companion case, *City of Kenosha v. Bruno*,<sup>111</sup> the Supreme Court held that municipalities were not subject to suit under the Civil Rights Act of 1871, vacated the judgments, remanded the cases, and directed the district court, after addressing the issue of jurisdiction, to reconsider its judgment in the light of *California v. LaRue*,<sup>112</sup> *Board of Regents v. Roth*,<sup>113</sup> and *Perry v. Sindermann*,<sup>114</sup> the latter two cases both involving the due process rights of teachers in administrative proceedings.

*Atlanta Attractions v. Massell*<sup>115</sup> involved an Atlanta, Georgia ordinance which provided for the revocation of a liquor license for

106. *Id.* at 115-16 (citation omitted).

107. *State ex rel. Ruffalo v. Common Council of City of Kenosha*, 38 Wis. 2d 518, 524, 157 N.W.2d 568, 571 (1968).

108. *Id.* at 525, 157 N.W.2d at 571.

109. 346 F. Supp. 43 (E.D. Wis. 1972); *accord*, *Escheat, Inc. v. Pierstorff*, 354 F. Supp. 1120 (W.D. Wis. 1973).

110. 346 F. Supp. at 51.

111. 412 U.S. 507 (1973).

112. 409 U.S. 109 (1972).

113. 408 U.S. 564 (1972). See notes 196-98 and accompanying text *infra*.

114. 408 U.S. 593 (1972). See notes 194-95 and accompanying text *infra*.

115. 330 F. Supp. 865, *reconsideration denied*, 332 F. Supp. 914 (N.D. Ga. 1971), *aff'd*, 443 U.S. 449 (1979).



the violation of any law or ordinance, other than traffic ordinances. When their license was revoked, one of the grounds being the presence of prostitutes on the premises, the plaintiffs sought civil rights relief in federal district court. The court held that the presence of prostitutes on the plaintiffs' premises did not violate any law or ordinance and took the position that the ordinance which permitted the revocation of a liquor license for the violation of any state law was overly broad and, therefore, unconstitutional. The Fifth Circuit affirmed but did not reach the constitutional question.<sup>116</sup>

There have been many other licensing cases in a variety of areas. A much publicized case arose out of the refusal of the New York State Athletic Commission to renew the boxing license of Cassius M. Clay (Muhammad Ali) because of his refusal to submit to induction into the armed forces of the United States, and his later conviction for that refusal. The Commission had previously granted, renewed, or reinstated boxing licenses in numerous instances in which the ap-

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116. 463 F.2d at 451.

The Supreme Court has recently faced a number of liquor license cases in addition to those already noted. In *B.P.O.E. Lodge No. 2043 v. Ingraham*, 297 A.2d 607 (Me. 1972), *appeal dismissed for want of a substantial federal question*, 410 U.S. 903 (1973), the Court was faced with a holding of the Supreme Judicial Court of Maine that a Maine statute which forbade any Maine corporation dispensing food, liquor, or other services from withholding membership or services to any person on account of race, religion, or national origin, and on the basis of which the Elks Lodge was refused a renewal license, was valid and did not violate the first amendment right of association. The Court, as noted, dismissed the appeal of the Elks Lodge for want of a substantial federal question. *But cf. Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

Other liquor licensing cases on the Court's 1972-1973 docket included: *Gianone v. California Alcoholic Beverage Control Bd.*, 412 U.S. 918 (1973), *denying cert. to* (9th Cir. Dec. 29, 1972); *Maita v. California Alcoholic Beverage Appeals Bd.*, 410 U.S. 928 (1973), *denying cert. to* (Cal. Sup. Ct. Sept. 7, 1972); *Massell v. Leathers*, 229 Ga. 503, 192 S.E.2d 379 (1972), *appeal dismissed*, 411 U.S. 911 (1973); *Coleman v. California Dep't of Alcoholic Beverage Control*, 409 U.S. 1075 (1972), *denying cert. to* (Cal. Ct. App. Feb. 24, 1972); *Byrd v. District of Columbia Alcoholic Beverage Control Bd.*, 289 A.2d 877 (D.C. Ct. App.), *cert. denied*, 409 U.S. 1075 (1972); *Poff v. California Dep't of Alcoholic Beverage Control*, 409 U.S. 1075 (1972), *denying cert. to* (Cal. Ct. App. May 10, 1972).

In *Massell v. Leathers*, *supra*, the Georgia Supreme Court sustained the denial of a municipal beer license on the ground that the license was a privilege rather than a right. *Accord, Smith v. Iowa Liquor Control Comm'n*, 169 N.W.2d 803 (Iowa 1969), *appeal dismissed and cert. denied*, 400 U.S. 885 (1970). However, the privilege-right dichotomy became absolute with *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969), and *Goldberg v. Kelley*, 397 U.S. 254, 262 (1970).

In *LaGreca Res., Inc. v. State Liquor Authority*, 33 App. Div. 2d 537, 304 N.Y.S.2d 165 (1st Dep't 1969), the Appellate Division reversed the State Liquor Authority's refusal to approve an application to permit a corporate change made by a prospective purchaser of a restaurant. The refusal was based upon the prospective purchaser's record which showed a conviction for disorderly conduct 16 years earlier, an alcoholic beverage violation 9 years earlier, and a declaration of juvenile delinquency 23 years earlier. The Appellant Division stated that the Authority had to exercise its duty to license consonant with the state policy to assist in the rehabilitation of persons convicted of crimes and the requirement that the good conduct of the applicant be considered. *But cf. Bergansky v. State Liquor Authority*, 39 App. Div. 2d 849, 332 N.Y.S.2d 783 (1st Dep't 1972), *rev'g per curiam* 68 Misc. 2d 251, 326 N.Y.S.2d 326 (Sup. Ct. N.Y. County 1971).

plicants had been convicted of one or more felonies, misdemeanors, or military offenses involving moral turpitude. Muhammad Ali, through his counsel, obtained injunctive relief in the United States District Court for the Southern District of New York against the Commission on the ground that the Commission's action violated the equal protection clause of the fourteenth amendment.<sup>117</sup>

Other recent cases have involved: licenses to operate a retail drug store<sup>118</sup> and a roller skating rink,<sup>119</sup> a license to be a private investigator,<sup>120</sup> a permit to construct a Federal Power Commission approved liquefied natural gas storage facility on company land which was regulated by a development commission,<sup>121</sup> permits to build houses within a city's boundaries when the federal government subsidizes part of the mortgage interest,<sup>122</sup> licenses to be refrigeration and air-conditioning technicians;<sup>123</sup> an automobile dealer's license,<sup>124</sup> and licenses for film theatres.<sup>125</sup>

Besides the myriad licenses in a multitude of fields that laws or ordinances make necessary, there are the many permits that are required for holding a meeting, having a gathering, or conducting a parade. The laws or ordinances which require such permits have usually been invalidated either as violating the freedoms of the first amendment, made applicable to the states by the due process clause of the fourteenth amendment, or as being vague and overbroad in violation of the due process clause of the fifth amendment with respect to federal action and the due process clause of the fourteenth amend-

117. *Ali v. Division of State Athletic Comm'n*, 316 F. Supp. 1246 (S.D.N.Y. 1970). Previously Ali had sought due process relief and had failed, but the court had granted leave to replead an equal protection violation. 308 F. Supp. 11 (S.D.N.Y. 1969).

118. *Milligan v. Board of Registration in Pharmacy*, 348 Mass. 491, 204 N.E.2d 504 (1965).

119. *Sunset Amusement Co. v. Los Angeles Bd. of Police Comm'rs*, 7 Cal. 3d 64, 496 P.2d 840, 101 Cal. Rptr. 768 (1972), *appeal dismissed for want of a substantial federal question*, 409 U.S. 1121 (1973).

120. *Leggett v. Ohio Dep't of Commerce*, \_\_\_\_ Ohio App. \_\_\_\_, *appeal dismissed*, 410 U.S. 920 (1973).

121. *Transcontinental Gas Pipe Line Corp. v. Hackensack Meadowlands Dev. Comm'n*, 464 F.2d 1358 (3d Cir. 1972), *cert. denied*, 409 U.S. 1118 (1973).

122. *Morales v. Haines*, 349 F. Supp. 684 (N.D. Ill. 1972).

123. *Arias v. Examining Bd. of Refrig. & Air Cond. Tech.*, 353 F. Supp. 857 (D.P.R. 1972).

124. *Ford v. New Car Dealers Policy & Appeals Bd.*, 30 Cal. App. 3d 494, 106 Cal. Rptr. 340, *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, (1973).

In *Katz v. California Dep't of Motor Vehicles*, 32 Cal. App. 3d 679, 108 Cal. Rptr. 424 (Ct. App. 1973), the court sustained the denial of a personalized license plate bearing the letters "E Z LAY."

125. *Avon 42nd Street Corp. v. Myerson*, 352 F. Supp. 994 (S.D.N.Y. 1972); *Paramount Film Distributing Corp. v. New York*, 30 N.Y.2d 415, 285 N.E.2d 695, 334 N.Y.S.2d 388 (1972), *cert. denied*, 94 S. Ct. 57 (1973). In *Avon*, the district court found that New York City's licensing ordinance failed to provide guidelines which were sufficiently precise to meet the requirements of the first amendment. In *Paramount*, the New York County Court found that the ordinance was unconstitutional and without protest under an unconstitutional licensing statute were not recoverable.

ment as concerns state action. Three recent cases which, in turn, cite many others provide sufficient examples. In *Shuttlesworth v. City of Birmingham*,<sup>120</sup> the Rev. Fred L. Shuttlesworth, a black minister, was convicted of violating a Birmingham, Alabama ordinance which made it an offense to participate in any parade, procession, or other public demonstration without first obtaining a permit from the city commission. The United States Supreme Court reversed the conviction and held that the ordinance, as written, was unconstitutional. Mr. Justice Stewart, writing for the Court, stated:

This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.

. . . .

. . . Even when the use of its public streets and sidewalks is involved, therefore, a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the "welfare," "decency," or "morals" of the community.<sup>127</sup>

*Healy v. James*<sup>128</sup> involved the denial by the president of a state-supported college of the request of a group of students seeking to form a local chapter of Students for a Democratic Society (SDS) for official recognition as a campus organization. Such recognition would have entitled them to use campus facilities for meetings, use of the campus bulletin board, and would have given them access to the school newspaper. The students sought relief in the federal district court, which, assuming that the students had the burden of showing entitlement to recognition by the college, held for the college.<sup>129</sup> The court of appeals affirmed. However, the Supreme Court reversed, placing the burden on the college to justify its decision. The Court reasoned:

[O]nce petitioners had filed an application in conformity with the requirements, the burden was upon the College administration to justify its decision of rejection. . . . It is to be remembered

126. 394 U.S. 147 (1969).

127. *Id.* at 150-51, 153.

128. 408 U.S. 169 (1972).

129. 319 F. Supp. 113, 116 (D. Conn. 1970).

that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities described above. While a college has a legitimate interest in preventing disruption on the campus, which under circumstances requiring the safeguarding of that interest may justify such restraint, a "heavy burden" rests on the college to demonstrate the appropriateness of that action.<sup>130</sup>

*Southeastern Promotions, Ltd. v. City of West Palm Beach*<sup>131</sup> was concerned with *Hair*, a rock musical in which there was mass, full-front nudity of both young men and women. The manager of the city's auditorium refused the promoter of *Hair* a license which was required to use the auditorium. The Fifth Circuit ordered declaratory and equitable relief on the ground that the manager's refusal violated the plaintiff's rights under the first and fourteenth amendments. A unanimous court stated:

This is a classic case involving the principle that our government is one of laws and not of men. The City of West Palm Beach, Florida, acting through a duly authorized official, refused a license to the promoter of the musical "Hair" to display the production in a municipal auditorium on the basis that the musical does not constitute "family entertainment." Finding that subjective authoritarianism in the denial of First Amendment rights is constitutionally intolerable, we conclude that the dictate of the auditorium manager in this case cannot withstand the mildest breeze emanating from the Constitution.

. . . .

. . . In the instant case the defendant Boyes has permitted the auditorium's public to hear or see only those expressions which had the blessing of Eighteenth Century morals. However, the unconventionalities of the Age of Aquarius cannot be constitutionally weighted by the bundling of our forefathers. Lest we become vassals of men rather than souls of law, we conclude that the Fourteenth Amendment prohibits this auditorium manager from being crowned a censor in chief.<sup>132</sup>

130. 408 U.S. at 184 (citations omitted).

131. 457 F.2d 1016 (5th Cir. 1972).

132. *Id.* at 1017, 1022.

Two other interesting cases deserve mention. In *Jenness v. Forbes*, 351 F. Supp. 88 (D.R.I. 1972), the court declared unconstitutional the denial of access to the Quonset Point Naval Air Station to Miss Linda Jenness, the Socialist Workers Party candidate for President of the United States, and to Dr. Benjamin Spock, the presidential candidate of The Peoples Party, both of whom sought to distribute campaign leaflets and hold a meeting. Vice-President Agnew had appeared at the station in his capacity as a candidate. The court stated:

Whatever the right of a base commander of a "closed" installation to deny access to the base to all political speakers or candidates, once he has granted access to one group of political speakers or candidates, he cannot then deny access to these

### B. Loyalty-Security Questions

While the courts have made their most solid progress in applying due process concepts to administrative proceedings in the licensing cases, they have made the least in cases involving loyalty-security questions. This is evidenced in such licensing cases as *Law Students Civil Rights Research Council v. Wadmond*,<sup>133</sup> *In re Anastaplo*,<sup>134</sup> and *Konigsberg v. State Bar of California*.<sup>135</sup>

The problem is pervasive. If loyalty-security questions are involved, an individual's rights and status may be determined in administrative proceedings on the basis of statements of secret informers, without confrontation or cross-examination, and even, at times, without appraisal. This has occurred in loyalty and security investigations; in hearings concerning federal and state employees; in investigations directed at a multitude of employees in defense related private industry, and at members or former members of our armed forces; in determinations involving aliens; in Selective Service hearings to determine whether an individual is a conscientious objector; and in the State Department's determinations with reference to the issuance or denial of passports. In one instance the Military Sea Transportation Service (MSTS), a branch of the Navy, ordered a marine engineer and two seamen off an American President Lines ship for security reasons, although all three seamen had Coast Guard clearance. The action was taken without notice or charges, because, according to the MSTS, disclosure of the reasons for it would have endangered the security of the United States.<sup>136</sup> The government has also denied cash benefits due more than 250 former Korean War prisoners because of secret Army charges of collaboration.<sup>137</sup> Various cases arising in such types of proceedings have reached the Supreme Court, but, as yet, the Court has not spoken out against the practice of using secret informers. On the contrary, the Court has sustained such practices in federal

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plaintiffs, candidates of minority political parties who seek to exercise their fundamental First Amendment rights.

*Id.* at 100.

In *James v. Nelson*, 349 F. Supp. 1061 (N.D. Ill. 1972), the court invalidated, as a violation of the first and fourteenth amendments, a university regulation conditioning door-to-door political canvassing in university residence halls on a favorable two-thirds vote of the residents of each dormitory.

133. 401 U.S. 154 (1971). See text accompanying notes 76-78 *supra*.

134. 366 U.S. 82 (1961) (denial of admission to Illinois bar based upon failure to answer questions not a denial of due process).

135. 366 U.S. 36 (1961) (denial of admission to California bar based upon failure to answer questions not a denial of due process).

136. See N.Y. Times, Jan. 20, 1958, at 44, cols. 6-7.

137. See N.Y. Times, Dec. 15, 1955, at 9, col. 1.

loyalty investigations and hearings in both *Bailey v. Richardson*,<sup>138</sup> and *Washington v. McGrath*,<sup>139</sup> although by evenly divided Courts. In a third such case, that involving Dr. John P. Peters<sup>140</sup> of Yale University, the Court avoided the issue. In *United States v. Nugent*<sup>141</sup> the Court sustained the practice of using secret informers in Selective Service hearings, and in *Jay v. Boyd*<sup>142</sup> sustained the practice in hearings to suspend deportation proceedings.

Three cases decided in June 1959 involved the issue of confrontation: *Vitarelli v. Seaton*,<sup>143</sup> *Greene v. McElroy*,<sup>144</sup> and *Taylor v. McElroy*.<sup>145</sup> All three cases arose from security clearance procedures.

138. 341 U.S. 918 (1951), *aff'g per curiam* 182 F.2d 46 (D.C. Cir. 1950).

139. 341 U.S. 923 (1951), *aff'g per curiam* 182 F.2d 375 (D.C. Cir. 1950).

140. *Peters v. Hobby*, 349 U.S. 331 (1955).

141. 346 U.S. 1 (1953), *followed in* *Leifer v. United States*, 260 F.2d 648 (6th Cir. 1958), *cert. denied*, 358 U.S. 946 (1959).

142. 351 U.S. 345 (1956).

143. 359 U.S. 535 (1959), *rev'g* 253 F.2d 338 (D.C. Cir. 1958).

144. 360 U.S. 474 (1959), *rev'g* 254 F.2d 944 (D.C. Cir. 1958). In this case, the United States Court of Appeals for the District of Columbia Circuit stated that the right to knowledge was not involved:

We are not dealing here with the vexed questions of the right of Congress, or the press, or the public, to be informed of defense operations generally, or to inspect particular documents. On this subject, see Mitchell, Government Secrecy in Theory and Practice: "Rules and Regulations" as an Autonomous Screen, 58 Colum. L. Rev. 199 (1958); Wolkinson, Demands of Congressional Committees for Executive Papers, 10 Fed. Bar. J. 103, 223, 319 (1949); Bishop, The Executive's Right of Privacy: An Unresolved Constitutional Question, 66 Yale L.J. 477 (1957); 40 Ops. Att'y Gen. 45 (1941). See also Hand, The Bill of Rights 17-18 (1958).

254 F.2d at 949, n.9.

The American Civil Liberties Union, in its brief before the Supreme Court, while claiming for the petitioner the right to cross-examine all persons who gave adverse information, nevertheless suggested as a minimum requirement, which would have been dispositive of the case, confrontation at least as to the casual informant:

[T]he Industrial Personnel Security Program is in no way jeopardized when the Government is required to separate the professional or "undercover" agent from the casual informant having no legitimate reason for secrecy, affording confrontation and cross-examination of the latter. See, Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv. L. Rev. 193, at 212-14, 233-43 (1956); Donovan & Jones, *Program for a Democratic Counter Attack to Communist Penetration of Government Service*, 58 Yale L.J. 1211, at pp. 1234-35 (1959).

Brief for American Civil Liberties Union as Amicus Curiae at 14, *Greene v. McElroy*, 360 U.S. 474 (1959).

145. 360 U.S. 709 (1959). In this case the Court granted certiorari in advance of the judgment of the Court of Appeals for the District of Columbia Circuit. For other employee cases where the United States District Court for the District of Columbia denied confrontation, see *Coleman v. Brucker*, 156 F. Supp. 126 (D.D.C. 1957), *rev'd and remanded on other grounds*, 257 F.2d 661 (D.C. Cir. 1958); *Dressler v. Wilson*, 155 F. Supp. 373 (D.D.C. 1957). Both district court decisions were by Judge Alexander Holtzoff. In *Dressler*, Judge Holtzoff declared: "To be sure, he was not confronted with the witnesses against him, but as the Court has just stated, there is no constitutional requirement of confrontation with witnesses outside of the criminal courts." *Id.* at 376. In *Coleman*, he asserted: "In other words, procedural due process, in the opinion of this Court, obviously is inapplicable to removals of employees from the Government service." 156 F. Supp. at 128. In that case he not only ruled against confrontation but also held that letters of notification which simply advised employees that their continued employment "would not be clearly consistent with the interests of national security" constituted findings under the applicable regulation. It was on the latter point that he was reversed. 257 F.2d at 663.

Vitarelli was a federal employee, while Greene and Taylor were both employees of private contractors with the Department of Defense. In all three cases, the lower courts ruled against confrontation and the Supreme Court reversed. However, in two of the cases, the Court did not reach the issue of confrontation, and in the third it said that it did not. In *Vitarelli* the Court rested its decision on the ground that the Secretary of the Interior had not followed his own regulations; and in *Taylor*, on mootness. (The Defense Department had notified all interested parties that the petitioner had been granted clearance.) In *Greene*, the Court held the procedures of the Department of Defense to be unauthorized. However, the Court, speaking through Chief Justice Warren, went further and stated:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where *administrative and regulatory action* were under scrutiny.<sup>146</sup>

During the course of the argument of *Greene*, Chief Justice Warren, underscoring the importance of the right to confrontation in the situation, asked counsel, "If my neighbor accuses me of anything else but this [that is, of being a bad security risk] that they are going to put me in jail or deprive me of my livelihood, I have a right to confront him. Why is this different?"<sup>147</sup>

The language in Chief Justice Warren's opinion led Justice Clark to feel that the Court had held that the due process clause of the

146. 360 U.S. at 496-97 (1959) (emphasis added).

Greene came before the Court a second time. The Court held, then, that he was entitled to recover lost earnings, estimated by him at \$49,960.41 from April 23, 1953, the date of his dismissal, to December 31, 1959. *Greene v. United States*, 376 U.S. 149 (1964).

147. N.Y. Times, Apr. 3, 1959, at 26, col. 2.

fifth amendment required confrontation and an opportunity for cross-examination in security hearings. In his dissent, Justice Clark noted that the Court disclaimed deciding the constitutional question, yet he was of the opinion that one reading the Court's opinion would have little doubt that the broad sweep of its language indicated the stance the Court would take in any future case. He expressed the hope that the Court would change its position for he felt that failure to do so would destroy the country's security system.<sup>148</sup>

The winds did blow somewhat in Justice Clark's direction for a time. Two years later, the Court in a 5-4 decision, upheld the security risk dismissal, without notice and without a hearing, of an employee of a restaurant concessionaire at the United States Naval Gun Factory in the city of Washington.<sup>149</sup> The Court analogized the employee's dismissal to the termination of government employment which it noted was, in the absence of legislation, a matter within the discretion of the appointment officer.<sup>150</sup> Justice Brennan, in a dissenting opinion in which Chief Justice Warren and Justices Black and Douglas joined, responded to the Court by pointing out what he characterized as an internal contradiction in the opinion to which he said he could not subscribe. He stated that while the Court held that the employee had a right "not to have her identification badge taken away for an 'arbitrary' reason," it, at the same time, held that she had "no right to be told in detail what the reason [for that action was], or to defend her own innocence, in order to show, perhaps, that the true reason for deprivation was one forbidden by the Constitution."<sup>151</sup>

In support of the right of confrontation in other than criminal cases, we have no less a protagonist than President Eisenhower himself. In an address to the B'nai B'rith Anti-Defamation League in Washington, D.C., in which he described Wild Bill Hickok's code in Abilene, Kansas, he said:

I was raised in a little town of which most of you have never heard. But in the West it is a famous place. It is called Abilene, Kansas. We had as our Marshal for a long time a man named Wild Bill Hickok. If you don't know anything about him, read your Westerns more. Now that town had a code, and I was raised as a boy to prize that code.

It was: meet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry.

148. 360 U.S. at 524 (1959) (Clark, J., dissenting).

149. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961).  
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150. *Id.* at 896.

151. *Id.* at 901 (Brennan, J., dissenting).



If you met him face to face and took the same risks he did, you could get away with almost anything, as long as the bullet was in the front.

And today, although none of you has the great fortune, I think, of being from Abilene, Kansas, you live after all by the same code, in your ideals and in the respect you give to certain qualities. In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate you or your character from behind, without suffering the penalties an outraged citizenry will impose.<sup>152</sup>

President Eisenhower's words were not entirely lost, for both Justices Frankfurter and Douglas quoted from his speech in their dissenting opinions in *Jay v. Boyd*.<sup>153</sup> Justice Frankfurter said: "President Eisenhower has explained what is fundamental in any American Code. A code devised by the Attorney General for determining human rights cannot be less. . . ."<sup>154</sup> Justice Douglas added: "The statement that President Eisenhower made in 1953 on the American code of fair play is more than interesting Americana. As my Brother FRANKFURTER says, it is Americana that is highly relevant to our present problem."<sup>155</sup>

As yet, however, only one strong decision, *Parker v. Lester*,<sup>156</sup> has favored confrontation in cases arising out of loyalty-security programs. In that case, the Ninth Circuit invalidated the Coast Guard's security procedure because it failed to provide for confrontation. The court based its decision on the due process clause of the fifth amendment.<sup>157</sup>

152. Address by President Eisenhower, November 23, 1953, on receiving America's Democratic Legacy Award at a dinner occasion of the fortieth anniversary of the Anti-Defamation League. U.S. President Press Release (Nov. 23, 1953).

153. 351 U.S. 345 (1956).

154. *Id.* at 372 (Frankfurter, J., dissenting).

155. *Id.* at 374 (Douglas, J., dissenting).

156. 227 F.2d 708 (9th Cir. 1955), *rev'd* 112 F. Supp. 433 (N.D. Cal. 1953). See Brown & Fassett, *Security Test for Maritime Workers: Due Process under the Port Security Program*, 62 YALE L.J. 1163 (1953).

157. 227 F.2d at 723. Subsequently the courts ruled that the seamen were entitled to their sailing papers before rather than after a hearing which measured up to due process requirements, *Lester v. Parker*, 235 F.2d 787 (9th Cir. 1956), *aff'd* 141 F. Supp. 519 (N.D. Cal. 1956). Thereafter the Court of Appeals denied a petition for rehearing. 237 F.2d 698 (9th Cir. 1956). However, the United States Court of Claims held that, although the Coast Guard employed the procedure which the court condemned in *Parker v. Lester*, 227 F.2d 708 (9th Cir. 1955), a shipmaster to whom the Coast Guard refused to issue a certificate of loyalty, did not have the basis for a claim against the United States which was within the class of cases cognizable in that court. *Dupree v. United States*, 141 F. Supp. 773 (Ct. Cl. 1956). The Court of Appeals for the Third Circuit, affirming the court below, then ruled that the shipmaster also could not make out a claim under the Federal Tort Claims Act. *Dupree v. United States*, 264 F.2d 140 (3d Cir. 1959), and 247 F.2d 819 (3d Cir. 1957), *aff'd* 146 F. Supp. 1948 (E.D. Pa. 1956).

The Supreme Court's opinion in *Greene*,<sup>158</sup> its earlier ruling in *Cole v. Young*<sup>159</sup> that the government's security program, set up in President Eisenhower's Executive Order 10450,<sup>160</sup> could not legally be applied to an employee in a non-sensitive position; the holding of the Ninth Circuit in *Parker v. Lester*,<sup>161</sup> and hearings by the Senate Subcommittee on Constitutional Rights resulted in much discussion of security questions, many recommendations for the reform of security procedures, and some reconsideration and revision of security programs. However, an exception to the confrontation rule has remained to protect the secret informer.

The most widely hailed of the recommendations for revision were contained in a comprehensive report of a special committee of the Association of the Bar of the City of New York.<sup>162</sup> That report suggested that witnesses be subject to cross-examination, under subpoena if necessary, unless the disclosure of his identity or the requirement of cross-examination would be injurious to national security.<sup>163</sup> In other words, there was to be confrontation unless the government decided, in the interest of secret informers, that there was not to be confrontation.

Justice Samuel H. Hofstadter of the New York Supreme Court criticized the special committee's retention of secret informers, and suggested that, in any case where they were used, the hearing board appoint a public advocate who would be drawn from a panel of lawyers with security clearances to cross-examine the secret witnesses — but in the absence of the accused and his private counsel.<sup>164</sup> This was the farthest any proposal ever went toward the elimination of secret informers.

In 1964 Congress passed a bill which gives the Secretary of Defense summary power to dismiss employees of the National Security Agency.<sup>165</sup> The American Civil Liberties Union asked President Johnson to veto the measure because it gave the Secretary power to effectuate such dismissals without a hearing, the right of cross-examination, the right to have information against the employee revealed, and the right of appeal. Nevertheless, the bill became law.

158. See note 144 and accompanying text *supra*.

159. 351 U.S. 536 (1956), *rev'g* 226 F.2d 337 (D.C. Cir. 1955), *aff'g* 125 F. Supp. 284 (D.D.C. 1954).

160. Exec. Order No. 10,450, 3 C.F.R. 936 (Supp. 1953), 5 U.S.C. § 7311 (1970).

161. See text accompanying note 156 *supra*.

162. Bonsal, *The Federal Loyalty-Security Program*, 11 Record of N.Y.C.B.A. 505 (1956).

163. *Id.* at 520.

164. N.Y. Times, Oct. 21, 1956, § 4, at 10, col. 7; *id.*, Oct. 17, 1956, at 18, cols. 3-4.

A 1966 act of Congress,<sup>166</sup> after defining "agency" to include the Departments of State, Commerce, Justice and Defense, a military department, the Coast Guard, the Atomic Energy Commission, the National Aeronautics and Space Administration, and any other governmental agency the President designated, provides that the head of an agency may suspend or remove an employee when "he determines that removal is necessary or advisable in the interests of national security."<sup>167</sup> An employee who has a permanent appointment is entitled, after suspension and before removal, to a written statement of the charges against him, but these charges need to be stated only "as specifically as security considerations permit."<sup>168</sup>

Counsel for clients in administrative or executive adjudicatory hearings no matter what type of proceeding and no matter whether on a state or federal level, should insist on the right to counsel, to a hearing, and of confrontation and cross-examination as a matter of due process. Ultimately the point will generally prevail.

Indeed, one has the impression that insistence of counsel on the right to confrontation and cross-examination has already made an impact, even in cases involving loyalty-security questions. *Dick v. United States*<sup>169</sup> furnishes an illustration. When Dr. Ronald Dick submitted an application for a secret clearance, he was referred to a Dr. Louis Linn, a psychiatric consultant for the Department of Defense, for an evaluation. Dr. Linn had information from the files of the Department of Defense that contained summaries of previous examinations and statements from other people who had contact with Dr. Dick. Based on this information and a personal interview, Dr. Linn concluded that Dr. Dick had a paranoid personality. Neither Dr. Dick nor his attorney were permitted to see the material from the Department of Defense files. The United States District Court for the District of Columbia sent the case back to the agency for further proceedings. The court began its analysis with *Greene v. McElroy*<sup>170</sup> and, relying on *Goldberg v. Kelley*<sup>171</sup> and *Escalera v. New York City*,<sup>172</sup> then stated:

Access to evidentiary material in the possession of an administrative body which will be considered and relied upon by that body in making its ultimate determination should ordinarily be afforded to the individual whose interest is at stake. Conversely,

166. 5 U.S.C. § 7531 (1970).

167. 5 U.S.C. § 7532(b) (1970).

168. 5 U.S.C. § 7532(c) (3) (A) (1970).

169. 399 F. Supp. 1231 (D.D.C. 1972).

170. 360 U.S. 474 (1959). See text accompanying note 143 *supra*.

171. 397 U.S. 254 (1970).

172. 425 F.2d 853a (2d Cir. 1970).

the full panoply of due process safeguards need not necessarily be afforded to the individual during the investigative, as opposed to the adjudicative, phase of an administrative proceeding.<sup>173</sup>

Nevertheless, the court gave the agency the choice of using the procedures outlined in the Industrial Personnel Security Clearance Program which provides that the head of the department supplying the material may certify "that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest."<sup>174</sup> However, the court did add: "The considerations previously discussed respecting psychiatric testimony argue strongly in favor of disclosure unless there are compelling reasons to the contrary."<sup>175</sup>

### C. *Passports, Visas, and Aliens*

The Department of State has consistently claimed that it can make determinations with reference to the denial or issuance of passports without confrontation; and, while the courts have never definitively ruled against the Department's position, federal district judges have divided on the question. In *Boudin v. Dulles*,<sup>176</sup> the plaintiff sought injunctive relief from a decision of the Secretary of State refusing to issue him a passport.<sup>177</sup> The refusal was based, in part, on confidential information contained in the Secretary's files which indicated that the plaintiff had been a member of the Communist Party. In remanding the case to the Passport Office for further hearings, the court stated that the concept of due process demanded that the decision to refuse to issue a passport must be based upon evidence that appears on the record. That requirement would assure that the applicant would have the opportunity to meet it and that the court would have the ability to review it.<sup>178</sup>

In *Dayton v. Dulles*,<sup>179</sup> however, the court, in circumstances similar to *Boudin*, held that a refusal to issue a passport based in part on

173. 339 F. Supp. at 1233 (citations omitted).

174. 32 C.F.R. § 155.7(d)(5)(i) (1972).

175. 339 F. Supp. at 1234.

176. 136 F. Supp. 218 (D.D.C. 1955).

177. The Secretary based the refusal upon section 51.135 of the Passport Regulations. That section empowered the Secretary to refuse passports to persons who were members of the Communist Party or who had recently terminated such membership. 136 F. Supp. at 219-20.

178. On appeal, the court of appeals affirmed the order for a rehearing on the grounds that the Secretary had failed to make the findings of fact sufficient to bring the plaintiff within the scope of section 51.135. The court did not reach the question of the propriety of the Secretary's use of confidential information. *Boudin v. Dulles*, 285 F.2d 321, 324 (D.C. Cir. 1956).

179. 146 F. Supp. 876 (D.D.C. 1956).

confidential information was not a denial of due process. The court of appeals affirmed, stating:

[T]he problem is whether disclosure would adversely affect our internal security or the conduct of our foreign affairs. The cases and common sense hold that the courts cannot compel the Secretary to disclose information garnered by him in confidence in this area. If he need not disclose the information he has, the only other course is for the courts to accept his assertion that disclosure would be detrimental in fields of highest importance entrusted to his exclusive care. We think we must follow that course.<sup>180</sup>

The Supreme Court, however, reversed, although it did not reach the constitutional due process issue.<sup>181</sup>

When it comes to the granting or denial of visas by our officials to aliens, and by foreign officials to residents of this country, there is precious little that comes to light about the exercise of discretion by administrative officials. *Kleindienst v. Mandel*<sup>182</sup> provides a brief, exceptional glimpse of this limited area. The named appellee, Ernest E. Mandel, was a Belgian Marxist whose visa for an American speaking tour in October and November 1969, was rejected by then Attorney General John N. Mitchell. Section 212(d)(3)(A) of the Immigration and Nationality Act of 1952<sup>183</sup> empowered the Attorney General, in his discretion upon the recommendation by the Secretary of State or a consular officer, to waive inadmissibility of certain aliens ineligible to receive visas and to approve temporary admission. Attorney General Mitchell refused to exercise his discretion in Mandel's favor, whereupon Mandel and eight American scholars took Mitchell to court with the result that a three-judge district court, by a 2-to-1 decision, held section 212(a)(28) of the Immigration and Nationality Act of 1952 violative of the first amendment. The court reasoned:

Since the First Amendment is not in its primary and most significant aspect a grant by the Constitution to the citizens of individual right of self-expression but on the contrary reflects the total retention by the people as sovereign to themselves of the right to free and open debate of political questions, the issue of "standing to sue" is immediately seen to be unreal. The concern of the First Amendment is not with a non-resident alien's individual and personal interest in entering and being heard, but with the rights of the citizens of the country to have the alien

180. 254 F.2d 71, 76-77 (D.C. Cir. 1957).

181. 357 U.S. 144 (1958).

182. 408 U.S. 753 (1972), *rev'g* Mandel v. Mitchell, 325 F. Supp. 620 (E.D.N.Y. 1971).

183. 8 U.S.C. § 1182(d)(3)(A) (1970).

enter and to hear him explain and seek to defend his views; that . . . is of the essence of self-government. Mandel's status as a party does not rest on any individual right to enter (for he has none) but exists only as against the effort to exclude him on a ground that denies to citizens of this country their primary rights to hear Mandel and debate with him. Here the plaintiffs other than Mandel are directly involved with Mandel's entry because they have invited him, and they expect to be among his auditors. No more is required to establish their standing . . . .<sup>184</sup>

The Supreme Court reversed, concluding:

We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant. What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case.<sup>185</sup>

The Court gave the following figures on the number of applications for waivers of admissions requirements for the years 1967 through 1971:<sup>186</sup>

<i>Year</i>	<i>Total Number of Applications for Waiver of Section 212(a)(28)</i>	<i>Number of Waivers Granted</i>	<i>Number of Waivers Denied</i>
1971	6210	6196	14
1970	6193	6189	4
1969	4993	4984	9
1968	4184	4176	8
1967	3860	3852	8

However, these figures only represent those cases that come to the Attorney General with a positive recommendation from the Secretary of State or one of his consular officers. The figures do not include those cases in which these officials refrained from making a positive recommendation. That is an area of discretion that does not see the light of day.

An alien, even one who is physically within the United States, can expect somewhat less in the way of due process treatment at the

184. 325 F. Supp. at 631-32.

185. 408 U.S. at 770.

186. *Id.* at 768 n.7.

hands of administrative officials than a citizen or a resident,<sup>187</sup> unless the alien has a citizen or a resident spouse. Thus, an American citizen who filed a visa petition for her husband was held entitled to be confronted with, and given an opportunity to rebut an investigative report and records that showed her husband had a wife and three minor children in Mexico.<sup>188</sup> Significantly, the administrative agency reached the conclusion on its own without any specific court prodding.<sup>189</sup>

#### D. Teachers — Tenured and Untenured

Teachers at state supported colleges and schools have fared moderately well at the hands of the courts in the extension of the due process concept to administrative proceedings. A number of Supreme Court decisions provide a fairly comprehensive introduction to the area: *Perry v. Sindermann*<sup>190</sup> involving a teacher who claimed tenure; *Board of Regents v. Roth*<sup>191</sup> involving an untenured teacher; *Connell v. Higginbotham*<sup>192</sup> involving an untenured teacher who was dismissed during the course of her employment; and *Slochower v. Board of Education*<sup>193</sup> involving a tenured teacher who was summarily dismissed.

Robert Sindermann had been a teacher for a decade in the state college system of Texas. The Board of Regents, without a hearing, declined to renew his contract for the next academic year. The college where Sindermann taught did not have formal tenure and he had no written contractual right to reemployment. However, he claimed tenure and further alleged that the decision not to rehire him had been based on his public criticism of the policies of the

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187. See, e.g., *Aalund v. Marshall*, 461 F.2d 710 (5th Cir. 1972); *Tieri v. INS*, 457 F.2d 391 (2d Cir. 1972).

Loyalty-Security questions have caused problems for naturalized citizens and resident aliens. In *Brown v. United States*, 356 U.S. 148 (1958), a denaturalization suit in which the government alleged that she had been a member of the Young Communist League and Communist Party from 1933 to 1937, the Court held that when the defendant took the stand and testified in her own behalf she waived her privilege against self-incrimination as to matters made relevant by her direct examination.

188. BIA, File A19 780 667, 41 U.S.L.W. 2256 (Milwaukee Oct. 27, 1972). The relevant regulations, 8 C.F.R. § 103.2(b)(2) (1971), provide for inspection of "the record of proceedings which constitutes the basis for the decision," but contains the frequent exception "that classified evidence shall not be made available."

189. When considering problems in this area, it is interesting to note that, in 1971, a few weeks after Sol Marks became regional director of the New York City office of the Immigration and Naturalization Service, he set up the post of ombudsman. Recently, Mr. Marks explained that the ombudsman is a catalyst and a sounding board who is "authorized to retrieve a case and review it — pry it loose from delay as it were." See N.Y. Times, Mar. 4, 1973, at 51, col. 1.

190. 408 U.S. 593 (1972).

191. 408 U.S. 564 (1972).

192. 403 U.S. 207 (1971).

193. 350 U.S. 551 (1956).

college administration. The Court held that he was entitled to an opportunity to establish that he had "tenure" and that if he could prove that, "such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency."<sup>194</sup> The Fifth Circuit, whose judgment the Court affirmed, had commented on college administrative procedures as follows:

School-constituted review bodies are the most appropriate forums for initially determining issues of this type, both for the convenience of the parties and in order to bring academic expertise to bear in resolving the nice issues of administrative discipline, teacher competence and school policy, which so frequently must be balanced in reaching a proper determination.<sup>195</sup>

In *Roth*, the Supreme Court confronted the dismissal of a professor who, unlike Prof. Sindermann, had been working for a short while and was nontenured. David Roth had been hired as an assistant professor of political science in Wisconsin State University-Oshkosh for the 1968-1969 academic year. Although he was rated as an excellent teacher by the faculty, he had publicly characterized the university's administration as being authoritarian and autocratic and had criticized it for suspending a group of 94 black students without determining individual guilt. During the course of the academic year he was told that he would not be rehired for the next academic term, and he was never told why. The Court held that "he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment."<sup>196</sup> However, the Court went on to state: "Our analysis of the respondent's constitutional rights in this case in no way indicates a view that an opportunity for a hearing or a statement of reasons for nonretention would, or would not, be appropriate or wise in public colleges and universities."<sup>197</sup>

The opinion of the district court, whose judgment the Seventh Circuit affirmed, and which was eventually reversed by the Supreme Court, seems more persuasive:

Substantial constitutional protection for a university professor against non-retention in violation of his First Amendment rights or arbitrary non-retention is useless without procedural safeguards,

194. 408 U.S. at 603.

195. 430 F.2d 939, 944-45 (5th Cir. 1970), *quoted in* Board of Regents v. Roth, 408 U.S. 564, 586 (1972) (Douglas, J., dissenting).

196. 408 U.S. at 578.

197. *Id.* at 578-79. (footnotes omitted).



I hold that minimal procedural due process includes a statement of the reasons why the university intends not to retain the professor, notice of a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed time and place. At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons. The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact.<sup>198</sup>

Through *Roth* and *Sindermann*, then, the Supreme Court defined the due process rights which must be accorded state employed teachers whose contracts are not renewed. When the teacher's interest in re-employment rises to a "property interest" it becomes protected by the fourteenth amendment and he must be afforded notice and a hearing at which he can challenge the sufficiency of the grounds for his non-retention. To reach that protected level the teacher's interest must be more than a mere unilateral expectation. There must be a right to re-employment which can be seen from the totality of the circumstances surrounding his employment. It may come from express tenure status, from the employment contract, or as in *Sindermann*, may be implied.

Stella Connell had been employed as a substitute classroom teacher in the fourth grade of Callahan Elementary School in Orange County, Florida. During the course of her employment she refused to sign a loyalty oath required of all Florida public employees and was dismissed. She brought suit in federal district court seeking declaratory and injunctive relief. A three-judge court held three of the five clauses of the oath violative of the first and fourteenth amendments. The court further held that the plaintiff was under no obligation to sign an oath containing unconstitutional language, that she was entitled to her salary for time spent teaching without pay, and that she was entitled to the salary she would have received for the rest of the school year.<sup>199</sup> The Supreme Court affirmed in part and reversed in part, holding, per curiam: "The second portion of the oath, approved by the District Court, falls within the ambit of decisions of this Court proscribing summary dismissal from public employment

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198. 310 F. Supp. 972, 979-80 (W.D. Wis. 1970), quoted with approval by Justice Douglas in his dissenting opinion in *Roth*. 408 U.S. at 585-86.

199. 305 F. Supp. 445, 454 (M.D. Fla. 1969).

without hearing or inquiry required by due process. That portion of the oath, therefore, cannot stand."<sup>200</sup>

Harry Slochower, an associate professor of German at Brooklyn College, was summarily dismissed under section 903 of the Charter of the City of New York which made a claim of one's right of silence an automatic basis for termination of employment without right to charges, notice, or hearing. Professor Slochower, when called to testify before the Senate Internal Security Subcommittee, stated that he was not a member of the Communist Party, and indicated complete willingness to answer all questions about his associations or political beliefs since 1941. However, he refused to answer questions concerning membership in the Communist Party during 1940 and 1941 on the ground that his answers might tend to incriminate him. Shortly after testifying he was notified that he was suspended from his teaching position and, then, that he was dismissed. The New York courts upheld the application of section 903 and affirmed the dismissal.<sup>201</sup> The Supreme Court reversed, holding the dismissal violative of due process, and stating that the treatment of Professor Slochower did not reflect "the 'protection of the individual against arbitrary action' which Mr. Justice Cardozo characterized as the very essence of due process."<sup>202</sup>

There are many comparable lower court rulings, some of which go beyond the Supreme Court's rulings. The lower courts did so in *Roth*.<sup>203</sup> In *Drown v. Portsmouth School District*,<sup>204</sup> a pre-*Roth* case, the First Circuit held that an untenured public school teacher was entitled to a statement of reason but not a hearing:

Courts are divided on the issue of the administrative procedural rights to which a non-tenured public school teacher is entitled when he is not rehired. Some say that the teacher has no right to an administrative hearing, although he does have a legal remedy, if he was dismissed for constitutionally impermissible reasons such as his race or the exercise of First Amendment rights. Others have held that a non-tenured teacher is entitled to a hearing even when there is no allegation that the decision not to rehire was made for constitutionally impermissible reasons. Still others have taken a middle course, requiring administrative hearings only when there is an allegation that a constitutionally impermissible reason motivated the decision not to rehire.

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200. 403 U.S. at 208.

201. 350 U.S. at 554-55.

202. 350 U.S. at 559.

203. See notes 196-98 and accompanying text *supra*.

204. 435 F.2d 1182 (1st Cir. 1970), *reh' denied*, 409 U.S. 972 (1971).

We . . . hold that the interests of the non-tenured teacher in knowing the basis for his non-retention are so substantial and that the inconvenience and disadvantages for a school board of supplying this information are so slight as to require a written explanation, in some detail, of the reasons for non-retention, together with access to evaluation reports in the teacher's personnel file.<sup>205</sup>

The Fifth Circuit, in *Ferguson v. Thomas*,<sup>206</sup> another pre-*Roth*, pre-*Sindermann* case, held that a teacher with an expectancy of continued employment was entitled both to a statement of reason and a hearing. The court considered that the "rudiments of due process fair play" which it had delineated with regard to the rights of college students subjected to disciplinary suspensions<sup>207</sup> were equally applicable to teachers who had an expectancy of reemployment. While noting that standards of procedural due process were not absolutes and may vary with any given situation, the court stated that minimum procedural due process required that a teacher who opposed his termination be provided: (1) notice of the cause for termination in sufficient detail; (2) notice of the names and nature of testimony of adverse witnesses; (3) a meaningful opportunity to present his defense; and (4) a hearing before a panel which is impartial and possesses some academic expertise.<sup>208</sup>

As can be seen, cases involving teachers have presented a great variety of factual situations. In *Pickering v. Board of Education*,<sup>209</sup> the Board of Education, after a full hearing, dismissed a teacher for writing and publishing a letter in a newspaper criticizing the Board's allocation of school funds between educational and athletic programs. The Supreme Court, in an opinion by Justice Marshall, concluded:

In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.<sup>210</sup>

The Fifth Circuit decided, in *Rainey v. Jackson State College*,<sup>211</sup> that the complaint of an assistant professor of English at a Mississippi

205. 435 F.2d at 1183-84, 1185 (citations omitted) (footnotes omitted). After remand, the school board gave Patricia Drown the reasons for nonrenewal of her contract. She then attacked the reasons as being arbitrary and capricious, but this time the courts ruled against her. 451 F.2d 1106 (1st Cir. 1971).

206. 430 F.2d 852 (5th Cir. 1970).

207. See, e.g., *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961).

208. 430 F.2d at 856.

209. 391 U.S. 563 (1968).

210. *Id.* at 574 (footnotes omitted).

211. 433 F.2d 1091 (5th Cir. 1970).

state college which alleged that he had been denied a hearing by the college's board of trustees on his charge that his contract of employment had not been renewed due to his testimony for the defense in a criminal obscenity case stated a cause of action under Section 1983 of the Civil Rights Act.<sup>212</sup>

The Seventh Circuit held, in *Hostrop v. Board of Junior College District No. 515*,<sup>213</sup> that a college president had almost as great a right of free speech as a teacher. In that case, a college president alleged that he had been fired because of an administrative staff memorandum in which he made recommendations for changes in the Ethnic Studies Program. The Seventh Circuit concluded that in the absence of actual proof that the circulation of the memorandum impaired the effectiveness of a close relationship with the school board, the memorandum was within the protection of the first amendment.

In *Duke v. North Texas State University*<sup>214</sup> the Fifth Circuit considered the case of a teaching assistant whose offer of reemployment had been rescinded following a speech she made at a rock concert that she had helped organize. In the speech she stated that the "system," as represented on the local level at the university, "fucks over" students. The district court ordered her fully reinstated according to the terms of the contract that had been offered to her.<sup>215</sup> The Fifth Circuit reversed on the ground that the faculty committee which comprised the panel that heard the case on the university level had possessed an apparent impartiality toward the charges.<sup>216</sup>

Cases involving teachers present not only the ordinary controversial issues but also their quota of loyalty security questions. An illustrative recent case is *Keyishian v. Board of Regents*,<sup>217</sup> wherein the Supreme Court held that portions of New York's complicated Feinberg Law were "invalid insofar as they proscribe[d] mere knowing membership without any showing of specific intent to further the unlawful aims of the Communist Party of the United States or of the State of New York."<sup>218</sup> Those provisions suffered "from impermissible 'overbreadth.'"<sup>219</sup>

212. 42 U.S.C. § 1981 *et seq.* (1970).

213. 471 F.2d 488 (7th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973).

214. 469 F.2d 829 (5th Cir. 1973).

215. 338 F. Supp. 990 (E.D. Tex. 1971).

216. 469 F.2d at 834.

217. 385 U.S. 589 (1967).

218. *Id.* at 609-10.

219. *Id.* at 609. To the extent of this holding, the Court rejected *Adler v. Board of Education*, 342 U.S. 485 (1952).

The *Keyishian* Court, through Justice Brennan, stated:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over that classroom.<sup>220</sup>

As was seen with *Connell*,<sup>221</sup> loyalty-security questions involving teachers have also arisen in cases challenging the requirements of loyalty oaths. The Supreme Court has usually invalidated such oaths on due process grounds: in *Baggett v. Bullitt*,<sup>222</sup> the Court held that the oath requirements of the State of Washington, and the statutory provisions on which they were based, were invalid on their face since they were "unduly vague, uncertain and broad";<sup>223</sup> in *Cramp v. Board of Public Instructions*,<sup>224</sup> the Court held that a Florida oath requirement and statute were unconstitutionally vague; and in *Wieman v. Updegraff*,<sup>225</sup> the court stated, with reference to an Oklahoma statute, that its "[i]ndiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process."<sup>226</sup>

An Arkansas statute compelled every teacher, as a condition of employment in a state-supported school or college, to file an annual affidavit listing, without limitation, every organization to which he belonged or regularly contributed within the preceding five years. In *Shelton v. Tucker*<sup>227</sup> the Court invalidated it, stating, through Justice Stewart: "It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society."<sup>228</sup>

However, school authorities may inquire as to a teacher's Communist affiliations in order to pass upon his fitness to teach. The Court so held in *Adler v. Board of Education*,<sup>229</sup> wherein it stated that "school authorities have the right and the duty to screen the

220. 385 U.S. at 603.

221. See notes 199-200 and accompanying text *supra*.

222. 377 U.S. 360 (1964).

223. *Id.* at 366; accord, *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (Arizona loyalty oath invalidated for overbreadth).

224. 368 U.S. 278 (1961).

225. 344 U.S. 183 (1952).

226. *Id.* at 191.

227. 364 U.S. 479 (1960).

228. *Id.* at 485-86.

229. 342 U.S. 485 (1952).

officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society . . . .”<sup>230</sup>

### E. Public Employees

Public employees generally have fared almost as well as teachers in the application of due process concepts to administrative proceedings. *Norlander v. Schleck*<sup>231</sup> is a case which illustrates the extent to which the law has developed in this area. Judith Norlander applied for a position as a clerk-typist with the city of St. Paul, Minnesota, a classified Civil Service position. She passed the requisite competitive typing examination and was notified that she had been assigned number 52 on the eligible or waiting list. In her application she had listed her employment history. After she was notified of her successful examination, her former employers and perhaps others were queried by means of a standard form which stated, in part, that all replies were to be held “strictly confidential.” Subsequently, she was notified in writing that her name had been removed from the eligible list “because of unsatisfactory references.” She requested information about the specific reasons for such removal and the substance of the charges. When her requests were denied, she went to court. The federal district court decided in her favor, holding that “timely notice of the bases of decisions and a reasonable opportunity afforded for refutation” was required.<sup>232</sup> The court relied on the Eighth Circuit’s opinion in *Cooley v. Board of Education*,<sup>233</sup> a case involving a teacher, and, adding its own emphasis, quoted from that opinion:

The jurisprudential basis upon which the constitutional doctrine of procedural Due Process rests is the judicially-created notion that *when Government acts so as to affect substantial and protected individual interests* or to adjudicate important and protected rights, *the Due Process Clause requires*, in the absence of a significant countervailing governmental interest, *that Government supply procedures which guarantee at least a modicum of fairness . . .*<sup>234</sup>

Ernest Fitzgerald, a civilian analyst who, in 1968, exposed to the Senate-House Joint Economic Committee a \$2 billion cost overrun by Lockheed on the giant C5A, appealed to the Civil Service Com-

230. *Id.* at 493; *accord*, *Beilan v. Board of Educ.*, 357 U.S. 399 (1958).

For other cases involving teachers *see* Appendix I *infra*.

231. 345 F. Supp. 595 (D. Minn. 1972).

232. *Id.* at 600.

233. 453 F.2d 282 (8th Cir. 1972).

234. 345 F. Supp. at 597, *quoting* *Cooley v. Board of Educ.*, 453 F.2d 282, 285

(8th Cir. 1972).

mission after he was dismissed through the subterfuge of having his job abolished. He contended that he was, in fact, illegally fired from his job in retaliation for the testimony he had given. The Commission granted him a hearing, but denied his numerous requests that it be open to the public and the press. Fitzgerald sought relief in the federal district court, which held that, contrary to the position taken by the Commission, due process required an open and public hearing and enjoined the Commission from holding any further hearings closed to the public and the press. The court of appeals affirmed,<sup>235</sup> stating:

"Where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings," the protections afforded by due process of law entitles the individual to a fair opportunity to show that the governmental action was unwarranted. Many of these protections have been formalized from those expressed in the Sixth Amendment, which provides that the accused in all criminal cases shall have the right "to a speedy and public trial, by an impartial jury," to be informed of the "nature and cause of the accusation," "to be confronted with the witnesses against him," to have "compulsory process for obtaining witnesses in his favor," and "to have the Assistance of Counsel for his defense."<sup>236</sup>

The Government contended that a regulation of the Commission specifically excluded the public and the press from its hearings.<sup>237</sup> The court of appeals was unimpressed and replied that since the purpose of keeping the hearings "closed to the public and press" was, as the government claimed to protect the individual involved, the individual could waive them.<sup>238</sup>

On the other hand, if an administrative agency does not follow its rules and the individual is injured and objects, courts will correct the error. In *Service v. Dulles*<sup>239</sup> the Court held that the dismissal of a foreign service officer by Secretary of State John Foster Dulles could not stand when the dismissal was in violation of Department of State regulations.

Likewise, when the director of the Montana office of the Federal Housing Administration was dismissed on such charges as (1) failure to exercise leadership qualities, (2) display of poor judgment, and (3) failures in maintaining effective personal working relationships

235. *Fitzgerald v. Hampton*, 467 F.2d 755 (D.C. Cir. 1972).

236. *Id.* at 763.

237. 5 C.F.R. § 772.305(c) (3) (1972).

238. 467 F.2d at 767. *Contra*, *Kelly v. Sterr*, 62 N.J. 105, 299 A.2d 390 (1973), petition for cert. filed, 41 U.S.L.W. 3609 (U.S. May 9, 1973) (No. 72-1514).

239. 354 U.S. 363 (1957).

with firms doing business with the FHA, the United States District Court for the District of Columbia ruled in his favor on the dual grounds that the charges were insufficiently specific, and that they were not listed in the "Table of Miscellaneous Offenses" in the agency's *Handbook for FHA Employees*.<sup>240</sup> It has also been held that termination of employment without an explanation of the employee's right to reply to the suspension notice or his right, ultimately, to appeal, when such an explanation is required by the applicable regulations, is violative of due process.<sup>241</sup>

In *Kennedy v. Sanchez*,<sup>242</sup> a three-judge court for the Northern District of Illinois held that the procedures and standards which were followed in the discharge of a field representative of the Chicago branch of the Office of Economic Opportunity violated both the fifth amendment requirement of due process and the first amendment guarantee of freedom of speech. The applicable statutory provisions and attendant regulations provided that employees receive not less than 30 days notice and be granted an appeal in which they were to be afforded a full evidentiary hearing. The court concluded that the failure to provide a full evidentiary hearing *prior* to termination with the attendant rights to be heard by an impartial hearing officer, to present witnesses, to confrontation, and to a written decision setting forth the reasons for discharge and supporting evidence rendered the statutory scheme violative of due process.<sup>243</sup> That decision has been appealed, and the Supreme Court has noted probable jurisdiction.

As usual, some cases concerning public employees have involved loyalty-security questions. Where such cases have arisen from the requirement for loyalty oaths, the Court has often struck the oaths down. It did so in *Baggett v. Bullitt*<sup>244</sup> with reference to the loyalty oath requirement of the State of Washington, and, as previously seen in *Connell v. Higginbotham*<sup>245</sup> and *Cramp v. Board of Public Instruction*<sup>246</sup> with reference to Florida's statutory provisions for loyalty oaths. The Court has also declared a provision of the Subversive Activities

240. *Massman v. Secretary of Housing & Urban Dev.*, 332 F. Supp. 894 (D.D.C. 1971).

241. *Clarke v. United States*, 350 F. Supp. 392 (E.D. Va. 1972).

242. 349 F. Supp. 863 (N.D. Ill. 1972), *probable jurisdiction noted sub nom.* Phillips v. Kennedy, 411 U.S. 915 (1973).

243. The court further held that 5 U.S.C. § 7501(a) (1970) was unconstitutionally vague in authorizing the removal and suspension without pay "for such cause as will promote the efficiency of the service." 349 F. Supp. at 866.

244. 377 U.S. 360 (1964); *accord*, *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (Arizona loyalty oath invalidated for overbreadth).

245. 403 U.S. 207 (1971).

246. 368 U.S. 278 (1961).



Control Act of 1950 an unconstitutional abridgement of the first amendment right of association.<sup>247</sup>

However, government authorities are entitled to question employees about Communist Party affiliations in order to determine their fitness for their jobs. The Court so held in *Lerner v. Casey*<sup>248</sup> with reference to a subway conductor employed by the New York City Transit Authority, and in *Garner v. Board of Public Works*<sup>249</sup> which involved Civil Service employees of the City of Los Angeles.

#### F. Government Contractors

Due process, of course, applies to property rights as well as to personal rights. So in *Gonzalez v. Freeman*<sup>250</sup> when the Commodity Credit Corporation, without notice or hearing, first suspended and then barred the plaintiffs for five years from participating in certain contracts, the Court of Appeals for the District of Columbia Circuit held that it could not be done. The Commodity Credit Corporation felt that the plaintiffs had misused official inspection certificates relating to commodities exported to Brazil. The court, in an opinion by Circuit Judge, now Chief Justice, Burger held:

On this record there is neither the appearance nor the reality of fairness in the process by which debarment of appellants was accomplished. Disqualification from bidding or contracting for five years directs the power and prestige of government at a particular person and, as we have shown, may have a serious economic impact on that person. Such debarment cannot be left to administrative improvisation on a case-by-case basis. The governmental power must be exercised in accordance with accepted basic legal norms. Considerations of basic fairness require administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to pre-

247. *United States v. Robel*, 389 U.S. 258 (1967). *Robel* involved a member of the Communist Party who remained an employee of a shipyard after it had been designated a defense facility by the Secretary of Defense. The statute made it unlawful for a member of a "Communist-action" organization to "engage in employment" at any designated defense facility if the organization was registered pursuant to the Act or if there was an outstanding final order that the organization register. Subversive Activities Control Act of 1950 § 5(a)(1)(D), 64 Stat. 992 (1950), as amended 50 U.S.C. § 784(a)(1)(D) (1970). The Court stated that that section of the statute contained "the fatal defect of overbreadth because it seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights." 389 U.S. at 303.

*Cf. United States v. Lovett*, 328 U.S. 303 (1946), where the Court invalidated as an unconstitutional bill of attainder a rider to an appropriation act by which Congress provided that no salary or other compensation was to be paid to three government employees whom Congress thought to be subversive.

248. 357 U.S. 468 (1958).

249. 341 U.S. 716 (1951).

For other cases involving public employees, see Appendix II *infra*.

250. 334 F.2d 570 (D.C. Cir. 1964).

sent evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made.<sup>251</sup>

*Scanwell Laboratories, Inc. v. Shaffer*<sup>252</sup> involved bids submitted to the Federal Aviation Administration for instrument landing systems to be installed at airports. An unsuccessful bidder brought suit to have the award to the successful bidder declared null and void because it was in violation of applicable statutory provisions and supporting regulations. The first question the court had to consider was the standing of a frustrated bidder to sue. Although the court conceded that a finding that the award was illegal did not mean the frustrated bidder had a right to the award, it nevertheless recognized the frustrated bidder's standing to sue as a sort of private attorney general, stating:

The public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a "private attorney general."<sup>253</sup>

In *Rudolph F. Matzer & Associates, Inc. v. Warner*<sup>254</sup> a naval agent, in violation of applicable regulations, gave inside information to the successful bidder. The court set aside the award. After conceding that courts must refrain from intervention in governmental procurement processes unless the actions of the executive officials were without any rational basis, the court continued:

The corollary of this rule is that if procurement officials act in a manner for which there is no rational basis in applicable law, they have exceeded their legislative mandate and courts have a duty to give relief as sought in the present case. This judicial duty also arises when a procurement official exercises discretion, which is concededly his under applicable law, in an abusive, unlawful or irrational manner.<sup>255</sup>

However, in the procurement process as well as in certain other areas, one will find the courts reluctant to step in because, in the words

251. *Id.* at 578; cf. *Horne Brothers, Inc. v. Laird*, 463 F.2d 1268 (D.C. Cir. 1972).

252. 424 F.2d 859 (D.C. Cir. 1970).

253. *Id.* at 864. In *International Eng'r Co. v. Richardson*, 42 U.S.L.W. 2076 (D.D.C. July 10, 1973), the court decided that an Air Force contracting officer's decision to remove a contractor's proprietary legend from data that it submitted pursuant to a contractual requirement was subject to judicial review.

254. 348 F. Supp. 991 (M.D. Fla. 1972).

255. *Id.* at 995. Published by Villanova University Charles Widger School of Law Digital Repository, 1973

of the Administrative Procedure Act, "agency action is committed to agency discretion by law."<sup>256</sup> However, it is that very discretion that the writer would like to see harnessed.

### G. Students

Students in state-supported schools and colleges have fared almost as well as teachers when it comes to the application of due process concepts to administrative proceedings involving them. A leading case is *Dixon v. Alabama State Board of Education*,<sup>257</sup> in which the Fifth Circuit held that "due process requires notice and some opportunity for hearing before a student at a tax-supported college [can be] expelled for misconduct."<sup>258</sup>

The student plaintiffs in *Dixon* had entered a publicly owned lunchroom located in the basement of the County Court House in Montgomery, Alabama and asked to be served. Service was refused and the lunchroom closed. When the students, blacks, refused to leave, police authorities were summoned and they were ordered out. They left the lunchroom but remained in the corridor of the courthouse for approximately one hour. On the same day Governor John Patterson, as Governor of Alabama and chairman of the State Board of Education, told Dr. Trenholm, president of Alabama State College, that the incident should be investigated and that if he were in the president's position he would consider expulsion. Subsequently, among other things, the students staged mass demonstrations. After one such demonstration on the steps of the state capital, the plaintiffs were summarily expelled. They sought injunctive relief in federal district court alleging that they were expelled solely because they had attempted to exercise their civil rights and had sought to be served at a public

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256. 5 U.S.C. § 701(a)(2) (1970). See, e.g., *Wheelabrator Corp. v. Chafee*, 455 F.2d 1306 (D.C. Cir. 1971); *M. Steintal & Co. v. Seamans*, 455 F.2d 1289 (D.C. Cir. 1971). In the latter case the court nevertheless stated:

We do not recede from our expression in *Scanwell* of the beneficial purposes served by frustrated bidders who, as "private attorney generals," can aid in furthering the public interest in the integrity of the procurement process. The courts are properly concerned that the procurement activities of the Government be carried out in accordance with the applicable statutes and agency regulations and that these governmental functions not be permitted to deteriorate into actions reflecting personal predilections [*sic*] of administrative officials, whether ascribable to whim, misplaced zeal, or impermissible influence. However the public interest in a Government procurement process that proceeds with expedition is likewise of importance. The court must refrain from judicial intervention into the procurement process unless the actions of the executive officials are without any rational basis.

*Id.* at 1305-06.

257. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

258. *Id.* at 158.

lunchroom. They claimed that the expulsion without notice or opportunity to defend violated their constitutional rights. The district court refused relief holding that the action taken against the students was not arbitrary, was justified, and did not deprive the students of any rights guaranteed by the Constitution.<sup>259</sup> Reversing, the Fifth Circuit noted that "[w]henever a governmental body acts as to injure an individual, the Constitution requires that the act be consonant with due process of law."<sup>260</sup> Recognizing that the procedural requirements necessary to satisfy due process vary with the circumstances and the interests involved, the court, as noted above, held that in this instance due process required notice and some opportunity for hearing.<sup>261</sup> The court then explained its view of the standards that notice and hearing should meet:

The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires something more than an informal interview with an administrative authority of the college. By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and

259. 186 F. Supp. 945, 952 (M.D. Ala. 1960), *rev'd*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

260. 294 F.2d at 155.

findings of the hearing should be presented in a report open to the student's inspection.<sup>262</sup>

A recent case that made headlines in the Midwest, *Behagen v. Intercollegiate Conference of Faculty Representatives*,<sup>263</sup> involved two members of the University of Minnesota varsity basketball team who were suspended without notice or a hearing for the remainder of the then current basketball season because of their participation in an altercation during a basketball game with Ohio State University. The federal district court held that the suspension violated due process and, while noting that the procedural requirements of due process may vary with the situation, described, as had the Fifth Circuit in *Dixon*, what it considered to be the relevant due process requirements:

Plaintiffs should be given a written notice of the time and place of the hearing at least two days in advance. Accompanying such notice should be a specification of the charges against each, and the grounds which, if proven, would justify imposition of a penalty. The hearing should be such that the Directors of Athletics have an opportunity to hear both sides of the story. This does not require a full-dress judicial hearing, with the right to cross-examine witnesses. However, it should include the presentation of direct testimony in the form of statements by each of those directly involved relating their versions of the incident. Plaintiffs should be given a list of all witnesses who will appear, and should be allowed to hear all testimony. Plaintiffs should be given a written report specifying the Directors' findings of fact, and if there is to be any punishment the basis for such punishment. The proceedings should be recorded, and the tapes should be made available to plaintiffs in the event they wish to appeal to the Faculty Representatives, as is their right pursuant to § VI(C) para. 4 of the Handbook. If these minimal standards are followed in cases of this nature, it is this Court's opinion that the requirements of due process will have been met.<sup>264</sup>

*Givens v. Poe*<sup>265</sup> is another case which illustrates the need for the recognition of due process principles in school administrative proceedings. The case was a class action brought by three black students who had been excluded from school without notice or an opportunity to be heard. The federal district court, noting that the question presented was the due process, or fairness, of the procedures by which discipline was administered in public schools, and not the substantive

262. *Id.* at 158-59.

263. 346 F. Supp. 602 (D. Minn. 1972).

264. *Id.* at 608.

265. 346 F. Supp. 602 (D. Minn. 1972).

correctness of the punishment itself, granted the plaintiffs detailed relief.<sup>266</sup> The court reviewed the applicable due process requirements stating:

The Supreme Court has written no blueprint. However, where exclusion or suspension for any considerable period of time is a possible consequence of proceedings, modern courts have held that due process requires a number of procedural safeguards such as: (1) notice to parents and student in the form of a written and specific statement of the charges which, if proved, would justify the punishment sought; (2) a full hearing after adequate notice and (3) conducted by an impartial tribunal; (4) the right to examine exhibits and other evidence against the student; (5) the right to be represented by counsel (though not at public expense); (6) the right to confront and examine adverse witnesses; (7) the right to present evidence on behalf of the student; (8) the right to make a record of the proceedings; and (9) the requirement that the decision of the authorities be based upon substantial evidence.<sup>267</sup>

The court noted that while not all courts which had considered the question had required all the items listed, all the items appeared to it to be essential if the substance and appearance of fairness were to be preserved.<sup>268</sup>

In a case in which four black girls were accused of assaulting two white students the Supreme Court of New Jersey held that a public school student charged with misconduct has the right to demand that witnesses against him appear in person to answer questions. If the witnesses did not do so their statement would not be considered or relied upon by the board.<sup>269</sup>

It may come as a surprise to some — it came as a shock to the writer — that there are still school districts which have regulations

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266. Interestingly, the court traced the due process concept back to the Periclean age:

Due process of law is not an American invention. It seems to have been a trademark of civilization for thousands of years. By the age of Pericles (5th Century B.C.), the concept of fair hearing seems to have been accepted; the chorus in Aristophanes' legal satire, "*The Wasps*," chanted that

"T'was a very acute and intelligent man,  
whoever it was, that happened to say,  
Don't make up your mind till you've heard  
both sides."

When the Apostle Paul was put on trial in the first century A.D. before Festus, that Roman governor refused to proceed against him without a hearing, reporting to King Agrippa that

"It was not the custom of the Romans to give up anyone before the accused met the accusers face to face and had opportunity to make his defense concerning the charge laid against him."

346 F. Supp. at 207.

267. *Id.* at 209.

268. Published by Villanova University Charles Widger School of Law Digital Repository, 1973

269. *Tibbs v. Board of Educ.*, 59 N.J. 506, 284 A.2d 179 (1971).

providing for corporal punishment. Northgate School District in Pennsylvania is one such district. Pursuant to its regulations corporal punishment was administered to a 12-year-old seventh grade student. His mother, on his behalf and in her own right, took the superintendent and others to court. In the writer's view, corporal punishment violates due process. However, the district court would not go that far, although it did hold that corporal punishment was not to be inflicted on "a child whose parents have notified the appropriate authorities that such disciplinary method is prohibited."<sup>270</sup>

As should be apparent, cases involving students have arisen from almost as great a variety of situations as have cases involving teachers. In addition to those cases already discussed they have, for example, also grown out of disputes concerning dress codes,<sup>271</sup> the marriage of high school students,<sup>272</sup> student intoxication,<sup>273</sup> the treatment of mentally retarded, emotionally disturbed and hyperactive students,<sup>274</sup> and admission policies.<sup>275</sup> The case of *Papish v. Board of Curators*<sup>276</sup> is illustrative of the first amendment issues often involved in student cases.

In *Papish*, a 32-year-old graduate student was dismissed from the University of Missouri after distributing an underground newspaper that contained a cartoon which depicted helmeted, club-wielding policemen raping the Statue of Liberty and the Goddess of Justice, and an article bearing the headline "Motherfucker Acquitted." At the time of her dismissal, the student was on academic and disciplinary probation, had been "pursuing" her graduate degree for 6 years, while making little, if any, academic progress. She was dismissed for violation of a university rule of conduct after receiving written charges and a "full and fair" hearing.<sup>277</sup> The student sought declaratory and injunctive relief on the grounds that her dismissal was violative of the first and fourteenth amendments. The district court denied relief and was affirmed by the Eighth Circuit which held the dismissal valid stating:

270. *Glaser v. Marietta*, 351 F. Supp. 555, 561 (W.D. Pa. 1972).

271. See text accompanying note 290 *infra*.

272. *E.g.*, *Moran v. School Dist.*, 350 F. Supp. 1180 (D. Mont. 1972) (enforcement of a rule preventing married students from participating in extracurricular activities enjoined pending a hearing and a final decision on the merits).

273. *E.g.*, *Cook v. Edwards*, 341 F. Supp. 307 (D.N.H. 1972) (readmission of a 15-year-old student ordered pending a hearing on the merits of a charge of appearing in school in an intoxicated condition).

274. *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (failure to provide children labeled as behavior problems, mentally retarded, emotionally disturbed, or hyperactive with publically supported specialized education held violative of both controlling statutes and due process requirements).

275. *E.g.*, *DeFunis v. Odegaard*, 507 P.2d 1169 (Wash. 1973) (admission preference accorded minority group students not violative of equal protection).

276. 410 U.S. 667 (1973), *rev'd* 464 F.2d 136 (8th Cir. 1972).

277. The Eighth Circuit so characterized the hearing. 464 F.2d at 138.

From what we hear said it is clear that the University action in this case cannot fairly be described as arbitrary, unreasonable or capricious. In point of fact, this is one of those cases, not at all unfamiliar in student-school litigation, where disciplinary action resulting from crass and absurd conduct is sought to be made redressable by characterizing the underlying factual events in constitutional terms.<sup>278</sup>

The Supreme Court, however, reversed per curiam, with the Chief Justice and Justices Blackmun and Rehnquist dissenting, and ordered reinstatement.<sup>279</sup> The Court stated:

Since the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech, and because the state University's action here cannot be justified as a nondiscriminatory application of reasonable rules governing conduct, the judgments of the courts below must be reversed. . . .<sup>280</sup>

Another illustrative case involving an underground newspaper is *Shanley v. Northeast Independent School District*.<sup>281</sup> A group of high school students authored, published, and distributed an underground newspaper entitled "Awakening." The newspaper was prepared during out-of-school hours, without the use of any materials or facilities owned or operated by the school system. The students distributed the papers one afternoon after school hours and one morning before school hours. At all times distribution was carried on near the school but outside the school premises on the sidewalk of an adjoining street separated from the school by a parking lot. The issue of "Awakening" that upset the school board was one that contained two statements which the board regarded as too controversial: a statement advocating a review of the laws with reference to marijuana; and another statement offering information on, among other things, birth control. For the distribution of this issue the five plaintiffs were suspended. The Fifth Circuit held that the defendants acted unconstitutionally. The court began its opinion by stating:

It should have come as a shock to the parents of five high school seniors . . . that their elected school board had assumed suzerainty over their children before and after school, off school grounds, and with regard to their children's rights of expressing their thoughts. We trust that it will come as no shock whatsoever

278. *Id.* at 145.

279. 410 U.S. at 671.

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281. 462 F.2d 960 (5th Cir. 1972).



to the school board that their assumption of authority is an unconstitutional usurpation of the First Amendment.<sup>282</sup>

The court concluded with these poignant comments:

Perhaps it would be well if those entrusted to administer the teaching of American history and government to our students began their efforts by practicing the document on which that history and government are based. Our eighteen-year-olds can now vote, serve on juries, and be drafted; yet the board fears the "awakening" of their intellects without reasoned concern for its effect upon school discipline. The First Amendment cannot tolerate such intolerance.<sup>283</sup>

In *Tinker v. Des Moines School District*<sup>284</sup> three high school students in Des Moines, Iowa, wore black armbands to publicize their objections to the Vietnam war. For this they were all sent home and suspended from school until they would come back without their armbands. The Supreme Court held the suspension to be violative of their first amendment rights, stating:

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. . . .<sup>285</sup>

The Board of Education of the Memphis City schools gave one student the choice of participating in the ROTC program, or forfeiting his high school diploma. The Sixth Circuit held that the state could not subject him "to such a Hobson's choice consistent with the Constitution. . . ."<sup>286</sup>

In *Wood v. Davison*<sup>287</sup> a group of students at the University of Georgia, members of a Committee on Gay Education, a homosexual group, sought permission to use the facilities of the University of Georgia for a conference and a dance to be sponsored by the Committee on Gay Education. The administrative officials of the University of Georgia denied the request, and the students took them to court. The federal district court restrained the denial of the facilities, stating:

282. *Id.* at 964.

283. *Id.* at 978.

284. 393 U.S. 503 (1969).

285. *Id.* at 506. *But cf.* *Williams v. Eaton*, 408 F.2d 1079 (10th Cir. 1972) (black athletes of the University of Wyoming football team dismissed after a dispute over their intentions to wear black armbands during a football game with Brigham Young University).

286. *Spence v. Bailey*, 465 F.2d 797, 800 (6th Cir. 1972).

287. 351 F. Supp. at 543 (N.D. Ga. 1972).

[I]t is not the prerogative of college officials to impose their own preconceived notions and ideals on the campus by choosing among proposed organizations, providing access to some and denying a forum to those with which they do not agree.<sup>288</sup>

Although students, unlike teachers, do not have to take loyalty oaths, their cases do involve loyalty questions as well as other controversial issues. As was noted previously, *Healy v. James*<sup>289</sup> involved the formation of a local chapter of Students for a Democratic Society (SDS).

The controversial issue that has most frequently arisen in cases relating to students has been that of hairstyle and dress. This issue has also troubled teachers and other public employees, members of the armed forces and prisoners; but it has troubled students most of all. What the courts have done has depended upon their views of constitutional law as to whether students had the right — either under the due process clause of the fourteenth amendment or under the ninth amendment, or under emanations from the Federal Bill of Rights or in its penumbra — to their own hairstyle and dress. As Justice Douglas wrote in his dissent from denial of certiorari in one of the hair cases: "There are well over 50 reported cases squarely presenting the issue, students having won in about half of them."<sup>290</sup>

The Supreme Court referred to the problem in *Tinker v. Des Moines School Dist.*:<sup>291</sup> "The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment."<sup>292</sup> But so far the Court has refused to take the issue.<sup>293</sup>

288. *Id.* at 549.

289. 408 U.S. 169 (1972). See text accompanying notes 128-30 *supra*.

290. *Olf v. East Side Union High School Dist.*, 404 U.S. 1042, 1046 n.5 (1972) (Douglas, J., dissenting).

291. 393 U.S. 503 (1969).

292. *Id.* at 507-08.

293. See, e.g., *Freeman v. Flake*, 448 F.2d 258 (10th Cir. 1971), *cert. denied*, 405 U.S. 1032 (1972); *King v. Saddleback Junior College Dist.*, 445 F.2d 932 (9th Cir. 1971), *cert. denied*, 404 U.S. 1042 (1972). In *Freeman v. Flake*, *supra*, Justice Douglas wrote in dissent:

Today the Court declines to decide whether a public school may constitutionally refuse to permit a student to attend solely because his hair style meets with the disapproval of the school authorities. The Court also denied certiorari in *Olf v. East Side Union High School District*, 404 U.S. 1042, which presented the same issue. I dissented in *Olf*, and filed an opinion. For the same reasons expressed therein, I dissent today. I add only that now eight circuits have passed on the question. On widely disparate rationales, four have upheld school hair regulations (see *Freeman v. Flake*, 448 F.2d 258 (10th Cir. 1971); *King v. Saddleback Junior College District*, 445 F.2d 932 (9th Cir. 1971); *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir. 1970); and *Ferrell v. Dallas Independent School District*, 392 F.2d 697 (5th Cir. 1968)), and four have struck them down (see *Martin v. New York City Bd. of Educ.*, 458 F.2d 999 (4th Cir. 1972); *Bishop v. Colaw*,

### H. Selective Service Classification Orders

Another large area of administrative determinations that involve an individual's liberty and may put his life in jeopardy is the issuance of Selective Service classification orders. Yet, the applicable regulation still provides: "That no registrant may be represented before the local board by anyone acting as attorney or legal counsel."<sup>294</sup> The courts have usually sustained this regulation.<sup>295</sup> The Supreme Court has not yet decided the issue. The United States District Court for the Northern District of California, in dismissing the indictment in *United States v. Weller*,<sup>296</sup> held that this provision was either unauthorized or unconstitutional. The Supreme Court heard argument but concluded that the appeal was not properly there and remanded the case to the Ninth Circuit.

The Military Selective Service Act as amended in September 1971, contained a new section entitled "Procedural Rights."<sup>297</sup> This section gives the registrant the right to appear in person before the local or any appeal board in order to testify and present evidence regarding his status; to present witnesses on his behalf before the local board; to have a quorum of the board present for any hearings; and, upon request, to have a brief, written statement of the reasons for any adverse decisions. There is, however, no provision for the right to counsel.

450 F.2d 1069 (8th Cir. 1971); *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970); and *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969)).

I can conceive of no more compelling reasons to exercise our discretionary jurisdictions than a conflict of such magnitude, on an issue of importance bearing on First Amendment and Ninth Amendment rights.

405 U.S. at 1032. The writer collected the cases in Rogge, *Williams v. Florida: End of a Theory* (pt. 2), 16 VILL. L. REV. 607, 699-701 (1971).

In *Lansdale v. Tyler Junior College*, 470 F.2d 659 (5th Cir. en banc 1972), cert. denied, 411 U.S. 412 (1973), the Fifth Circuit en banc refused to extend *Karr v. Schmidt*, 460 F.2d 609 (5th Cir. en banc 1972) (high school hair regulation sustained) to college students.

The Tenth Circuit recently followed its *Freeman v. Flake* ruling in *New Rider v. Board of Educ.*, 480 F.2d 693 (10th Cir. 1973). For a recent case to the contrary, see *Mick v. Sullivan*, 476 F.2d 973 (4th Cir. 1973) ("the right to choose one's hairstyle is one aspect of the right to be secure in one's person guaranteed by the due process and equal protection clauses of the Fourteenth Amendment." *Id.* at 973).

For other cases involving students, see Appendix III *infra*.

294. 32 C.F.R. § 1624.1(b) (1972).

295. See, e.g., *McAndrew v. Selective Serv. Bd.*, 438 F.2d 534 (9th Cir.), cert. denied, 404 U.S. 854 (1971); *United States v. Evans*, 425 F.2d 302 (9th Cir. 1970); *United States v. Tantash*, 409 F.2d 227 (9th Cir.), cert. denied, 395 U.S. 968 (1969); *Haven v. United States*, 403 F.2d 384 (9th Cir. 1968); *United States v. Dicks*, 392 F.2d 524 (4th Cir. 1968); *Nickerson v. United States*, 391 F.2d 760 (10th Cir.), cert. denied, 392 U.S. 907 (1968); *United States v. Capson*, 347 F.2d 959 (10th Cir. 1965).

296. 309 F. Supp. 50 (N.D. Cal. 1969), remanded, 401 U.S. 254 (1971), appeal dismissed 466 F.2d 1279 (9th Cir. 1972).

297. Military Selective Service Act, Title I, § 101(a)(36), 50 U.S.C. App. § 4714 (Supp. II 1972).

In December 1972, the Administrative Conference of the United States, at its eighth plenary session in Washington, D.C., adopted the recommendation of its Committee on Judicial Review encouraging the Selective Service System to amend its procedural regulations in order to allow the representation of registrants by counsel, and to provide for the preparation of suitable transcripts of local board and appeal board proceedings. The recommendation also called for pre-induction review of Selective Service classification orders.<sup>298</sup> Section 10(b)(3) of the Military Selective Service Act forbids judicial review of administrative determinations relating to the classification or processing of any registrant except as a defense to a criminal prosecution.<sup>299</sup>

However, if the Selective Service System goes beyond the limits of authorized discretions — and sometimes even if it exercises discretion in an arbitrary or capricious manner — or fails to follow its own regulations, or violations constitutional rights, the courts will, with reluctance, give relief. A trilogy of Supreme Court cases: *Gonzales v. United States*,<sup>300</sup> *Simmons v. United States*<sup>301</sup> and *Sicurella v. United States*<sup>302</sup> is illustrative. In each case, the petitioner was a member of Jehovah's Witnesses and claimed exemption as a conscientious objector. In *Gonzales* the Department of Justice had not furnished the petitioner with a copy of its adverse recommendation to the appeal board. Although the applicable statute did not expressly require this, the Court found that such a requirement was implicit in the act and regulations in order that the individual be afforded an opportunity to reply. Accordingly, the Court reversed petitioner's conviction for refusing to submit to induction.

In *Simmons*, the Court held that the petitioner was entitled to a fair summary of the material in a FBI report on him. Because he had not received such a summary, the Court reversed his conviction for refusal to submit to induction. *Simmons* stands somewhat in contrast to *United States v. Nugent*<sup>303</sup> wherein the Court sanctioned the use of secret informers in Selective Service proceedings.

In *Sicurella* one of the grounds on which the appeal board made the classification was invalid. Since it was impossible to say on which ground the appeal board decided, the Court reversed the resulting conviction.<sup>304</sup>

298. See 41 U.S.L.W. 2326, 2327 (Dec. 26, 1972).

299. 50 U.S.C.A. § 460(b)(3) (Supp. 1973). See *Fein v. Selective Serv. Sys.*, 405 U.S. 365 (1972).

300. 348 U.S. 407 (1955).

301. 348 U.S. 397 (1955).

302. 348 U.S. 385 (1955).

303. 346 U.S. 1 (1953).

304. The Court recently followed *Sicurella* in *Clay v. United States*, 403 U.S. 698 (1971). But cf. *United States v. Francis*, 457 F.2d 553 (10th Cir.), cert. denied, 409 U.S. 1040 (1972).

In several cases, the courts have granted relief to inductees because the local board, or appeal board as the case was, considered so many cases at a particular sitting that the courts concluded the registrants were not accorded due process. In *United States v. Wallen*,<sup>305</sup> a conscientious objector case, an appeal board acted upon 122 field cases at a two-hour meeting; in *Slettehaugh v. Tarr*,<sup>306</sup> a hardship deferment case, an appeal board considered 262 cases in a period of 4¾ hours; and in *United States v. Weaver*,<sup>307</sup> another conscientious objector case, a local board considered and voted on 449 cases during the course of two hours. In *Wallen*, the district court reasoned:

It does not require lengthy argument to this court to convince that a 59 second appeal is not a meaningful appeal proceeding. It is almost a routine "rubber stamp" operation. It is a hearing or meeting at which, under the present regulations, defendant is not entitled to be present. . . .

. . . The proceeding is offensive to the concept of due process and the indictment in defendant's case should be dismissed for failure of the appeal board to have afforded defendant meaningful rights as guaranteed under the due process clause of the Fifth Amendment and Fourteenth Amendment.<sup>308</sup>

In *United States v. Saunders*,<sup>309</sup> the Fourth Circuit reversed the judgment of conviction of a registrant who failed to report for induction after he had been reclassified by his local board on the basis of a letter written by his former brother-in-law. The appeal board had relied on both that letter and one from the registrant's former wife when rejecting his appeal of the reclassification. The Fourth Circuit held that fundamental fairness required that the registrant be afforded an opportunity to rebut the letters.

In *United States v. Cabbage*<sup>310</sup> the secretary of a local board put in a registrant's file, without the registrant's knowledge, a summary of an FBI report that charged he was trying to organize Black Power followers and was being closely watched by the FBI. The Sixth Circuit held that the action constituted a due process violation.

305. 315 F. Supp. 459 (D. Minn. 1970).

306. 322 F. Supp. 180 (D. Minn. 1971).

307. 336 F. Supp. 558 (E.D. Pa. 1972).

308. 315 F. Supp. at 460-61. *But cf.* *United States v. Young*, 324 F. Supp. 69 (D. Minn. 1970).

309. 467 F.2d 675 (4th Cir. 1972); *accord*, *United States v. Thompson*, 431 F.2d 1265 (3d Cir. 1970).

310. 430 F.2d 1037 (6th Cir. 1970); *accord*, *United States v. Owen*, 415 F.2d 383 (8th Cir. 1969). In *United States v. Ford*, 431 F.2d 1310 (1st Cir. 1970), the First Circuit invalidated an induction order because the clerk of a local board sent two letters to the local board to the armed forces examining and entrance station so the registrant's deep neurosis.

The courts have also given relief when the local board's action has had no apparent basis in fact. One such case was *United States v. Jarvis*.<sup>311</sup> Malcolm Jarvis was irreplaceable as a special education teacher at a youth development center school near Pittsburgh. His local board denied his request for an occupational deferment and he was ordered to report for induction. He refused to report and was charged with willful refusal to submit to induction. The federal district court concluded that the denial of the occupational deferment was without basis in fact.

As for conscientious objectors, the government assured the Supreme Court in *Ehlert v. United States*<sup>312</sup> that one whose beliefs, assertedly crystallized after mailing of an induction notice, will have full opportunity to obtain an in-service determination of his claim without having to perform combatant training or service pending such a disposition. It seems safe to say that the courts will hold the government to this assurance. In *Crotty v. Kelly*<sup>313</sup> the First Circuit held, "Applying *Ehlert* in conjunction with *Gonzales*, therefore, we conclude that failure to afford petitioner access and a chance to respond to all reports and recommendations concerning his conscientious objector claim was a denial of due process."<sup>314</sup>

In *Scott v. Commanding Officer*<sup>315</sup> the Third Circuit invalidated an induction order because the registrant's file contained no statement of the reasons for the Board's refusal to reopen his classification. The registrant had claimed conscientious objector status after receiving his induction order. After several delays he reported for induction but filed a petition in the district court for a writ of habeas corpus. The district court denied the writ. However, the Third Circuit considered that, in the face of the Board's failure to state the reasons for its action, it had no choice but to order the writ be issued.

### I. Members of the Armed Forces

There is no area in which there are more discretionary orders than in the armed forces. There are commands and chains of commands. Moreover, the courts rarely step in. As Justice Jackson explained in the Court's opinion in *Orloff v. Willoughby*:<sup>316</sup>

311. 341 F. Supp. 691 (E.D. Pa. 1972).

312. 402 U.S. 99 (1971).

313. 443 F.2d 214 (1st Cir. 1971).

314. *Id.* at 217.

315. 431 F.2d 1132 (3d Cir. 1970).

For other cases involving the Selective Service System, see 5 PLEI SELECTIVE SERV. J. REP. 3001 (1972).  
 316. 345 U.S. 83 (1953).

We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.<sup>317</sup>

In *Orloff* the Army refused a commission to a doctor because he would not state whether he was, or had ever been, a member of the Communist Party. The doctor asked the courts for habeas corpus relief; the courts denied it.

An apt illustration of the extent of the military's exercise of administrative discretion can be seen in the area of discharge. The armed forces currently use five types of discharges: honorable, general (under honorable conditions), undesirable (under conditions other than honorable), bad conduct (under conditions other than honorable), and dishonorable. While the latter two discharges can be given only to enlisted personnel and only pursuant to a court-martial sentence, an undesirable discharge, one which will brand the person for life, can be given without notice or a hearing, without confrontation and cross-examination. A former lieutenant in the Judge Advocate General's Corps has expressed the view that this discharge procedure does not accord the individual "even the rudiments of due process of law."<sup>318</sup>

Although the courts, as noted, are reluctant to interfere with the exercise of military discretion, they will, as in the case of selective service classification orders, give relief in certain situations. For example, in *Harris v. Kaine*,<sup>319</sup> the district court granted relief to an Army reservist who had been expelled from a reserve drill and denied his pay for that meeting because he wore a short-hair wig to satisfy the requirement that he present a neat and soldierly appearance.

317. *Id.* at 93-94.

318. See, e.g., *Lawrence v. Reed*, 57 A.B.A.J. 875, 877 (1971).

319. 352 F. Supp. 769 (S.D.N.Y. 1972).

The court based its decision on two grounds: first, that the regulation which proscribed the wearing of a wig except by bald or disfigured males, exceeded statutory authority; and second, that the right to wear one's hair at any length or in any desired manner "is an ingredient of personal freedom protected by the United States Constitution."<sup>320</sup>

Another factually interesting wig case is *Baugh v. Bennett*<sup>321</sup> which involved a long-haired member of the Idaho Army National Guard. When his long hair got him into trouble John Baugh started wearing a short-length wig. His wig was discovered and he was again in trouble. He then appeared before the General wearing a short wig, and the General concluded that he had suffered a haircut. He was thereupon advised that he was in conformance, that he was reinstated in a Satisfactory Performance status, and that his past absences were excused. Baugh promptly communicated the ruling to his immediate superiors, but those doubting Thomases made inquiry up the chain of command with the result that Baugh was involuntarily called to active duty. The United States District Court for the District of Idaho granted relief on the ground that Baugh "was denied due process of law in that he was not afforded the meaningful appeal to which he was entitled by Army regulations."<sup>322</sup>

In *Feliciano v. Laird*<sup>323</sup> the Second Circuit issued a writ of mandamus to require the Army properly to reconsider, de novo, the application for a hardship discharge of a draftee whose 17-year-old wife had given birth prematurely and was in a state of severe, suicidal depression. The writ was issued because the Army had failed to follow its own regulations and forward the application to the Selective Service System.

In another hardship discharge case, *Townley v. Resor*,<sup>324</sup> the United States District Court for the Northern District of California ordered that the discharge application be remanded to the Army. The soldier involved had made a prima facie case for a hardship discharge and the Army denied his application without stating its reasons. The court, while noting that it could only reverse the Army decision if it was arbitrary and capricious and thus violative of due process, stated:

320. *Id.* at 775; *accord*, *Friedman v. Froehlke*, 470 F.2d 1351 (1st Cir. 1972). *Contra*, *Anderson v. Laird*, 437 F.2d 912 (7th Cir. 1971); *Comunale v. Mier*, 355 F. Supp. 429 (W.D. Pa. 1973); *McWhirter v. Froehlke*, 351 F. Supp. 1098 (D.S.C. 1972); *Cossey v. Seamans*, 344 F. Supp. 1368 (W.D. Okla. 1972).

321. 329 F. Supp. 20 (D. Idaho 1971).

322. *Id.* at 24.

323. 426 F.2d 424 (2d Cir. 1970).

324. 323 F. Supp. 567 (N.D. Cal. 1970).



Since a prima facie case has been made, it is incumbent on the Army to state clearly its reasons for denying the application. Without these reasons, meaningful judicial review is a nullity and a measure of due process is summarily removed from the system.<sup>325</sup>

Students at military academies receive somewhat more in the way of due process relief than other members of the military services, probably because their education and careers are at stake. Thus, in *Hagopian v. Knowlton*,<sup>326</sup> Joachim Hagopian, a demerit-prone cadet facing expulsion and order to active duty because of five excess demerits, won a court order preventing his expulsion from West Point. The district court held that under the fifth amendment he was entitled to a fair hearing, including notice of charges against him, adequate opportunity to present defense, and right to legal counsel. The court observed that almost half of the cadet's demerits for such infractions as wearing a dirty uniform, failing to get a haircut, and using an unauthorized telephone, resulted from reports by the company tactical officer who was the cadet's immediate superior. The same officer reported the infractions, awarded the demerits, and subsequently determined that the demerits were correct. The court stated:

Such merger of prosecutorial and judicial function may be entirely satisfactory for purposes of "correctional and educational discipline" whereunder reasonable punishment is imposed to improve the efficiency or character of a cadet. It does not satisfy due process or the simple needs of natural justice, where, as here, a cadet will be also subject to a substantial forfeiture and irreparable damage, in the nature of expulsion.

There is nothing new to our jurisprudence in the theory that no single person should be both prosecutor and judge in a cause.<sup>327</sup> The Second Circuit affirmed, stating:

In approaching the question of what process is due before governmental action adversely affecting private interests may properly be taken, it must be recognized that due process is not a rigid formula or simple rule of thumb to be applied undeviatingly to any given set of facts. On the contrary, it is a flexible concept which depends upon the balancing of various factors, including the nature of the private right or interest that is threatened, the extent to which the proceeding is adversarial in character, the severity and consequences of any action that might be taken, the burden that would be imposed by requiring use of all or part of the full panoply of trial-type procedures, and the existence of other overriding in-

325. *Id.* at 568-69.

326. 426 F.2d 1206 (2d Cir. 1970), *aff'd*, 346 F. Supp. 29 (S.D.N.Y.).

327. 346 F. Supp. at 32.

terests, such as the necessity for prompt action in the conduct of crucial military operations. The full context must therefore be considered in each case. It could hardly be contended, for instance, that disciplinary action on the field of battle must conform to procedures applicable to the demotion of a civilian employee on the home front.<sup>328</sup>

The courts have also begun to give some relief where actions by the armed forces have invaded constitutional rights of the people. *Morgan v. Rhodes*,<sup>329</sup> a case arising out of the deaths of students on Kent State University campus at the hands of the Ohio National Guard, is an example. Certain students and others sought broad injunctive and declaratory relief against the Governor of Ohio and the commanding officers of the Ohio National Guard. The district court dismissed the complaint on the grounds that it failed to state a claim cognizable under federal law. The Sixth Circuit reversed, stating that one of the causes of action presented the question of whether there was and is "a pattern of training, weaponry and orders in the Ohio National Guard which singly or together require or make inevitable the use of fatal force in suppressing civilian disorders . . . ."<sup>330</sup> The Sixth Circuit held that this cause of action was judicially cognizable.

The Second Circuit, in *Cortright v. Resor*,<sup>331</sup> has gone in a different direction. That case involved the transfer of Army Band members in order to halt public expressions of disagreement with the Vietnam War. The district court granted relief but the Second Circuit reversed. An appealing dissent concluded:

The majority would await a "stronger case" to intervene to protect a serviceman's First Amendment rights. I suspect that there were those who counselled waiting for a higher tax to throw the tea into Boston Harbor, or suggested to Andrew Hamilton that he wait for a client with a better case than John

328. 470 F.2d at 207; cf. *Zitser v. Laird*, 352 F. Supp. 438 (D. Conn. 1972); *Ballard v. Laird*, 350 F. Supp. 167 (S.D. Cal. 1972). But cf. *White v. Knowlton*, 361 F. Supp. 445 (S.D.N.Y. 1973) (United States Military Academy's procedure for handling alleged honor code violations did not constitute a denial of due process).

In a suit brought by Dennis O'Neill, federal District Judge John R. Bartels struck down as unconstitutional a regulation of the United States Merchant Marine Academy that prohibited marriage by cadets. See Kaplan, *Court Voids Ban on Marriages by the Merchant Marine Academy*, N.Y. Times, July 18, 1973, at 13, col. 1.

329. 456 F.2d 608 (6th Cir.), cert. granted, 409 U.S. 947 (1972). In *Krause v. Rhodes*, 471 F.2d 430 (6th Cir. 1972), cert. granted, \_\_\_ U.S. \_\_\_ (1973), and *sub nom. Scheuer v. Rhodes*, \_\_\_ U.S. \_\_\_ (1973), the court held that the governor, the adjutant general, and other officers and enlisted men of the National Guard enjoyed immunity from suit for the actions of the National Guard on the Kent State University campus.

330. 456 F.2d at 612.

331. 447 F.2d 245 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972). *Lovullo v. Rhodes*, 468 F.2d 349 (2d Cir. 1972), cert. denied, \_\_\_ U.S. \_\_\_ (1973). Members in this case.

Peter Zenger's to argue for free expression. I would, rather, agree with Coke's aphorism: "No restraint be it never so little, but is imprisonment, and foreign employment is a kind of honourable banishment."<sup>332</sup>

### *J. Bar Association Endorsements*

Bar associations frequently rate candidates for judicial office. For example, the Committee on the Judiciary of The Association of the Bar of the City of New York rates candidates as "Approved as Highly Qualified," "Approved" and "Not Approved." Are the individuals so rated entitled as a matter of due process to notice and a hearing before being rated?

In 1972 there were seven candidates for three judgeships on the New York Court of Appeals, the State's highest court. One of the seven, Family Court Judge Nanette Dembitz was rated "not qualified" by The New York State Bar Association, the only one of the seven so rated. However, Judge Dembitz was found qualified by The Association of the Bar of the City of New York, the New York State Trial Lawyers Association, a state Democratic party commission headed by a former chief judge of the Court of Appeals, and a group of Columbia University law professors. Judge Dembitz asked the State Bar Association for a hearing. The New York Times editorialized: "The State Bar Association cannot hide behind private rules of confidentiality once it has passed judgment in a public election. Judge Dembitz has asked the State Bar Association for a hearing; it should be granted."<sup>333</sup>

In the Republican sweep of that year Judge Dembitz, a Democrat, as well as the other Democratic candidates lost to the three Republican candidates.

### *K. Discretion of Prosecutors*

Although it may rarely be apparent, prosecutors exercise discretion as to whom to prosecute and for what offenses. In addition, there is the so-called "Brooklyn Plan" under which the prosecutor, if he deems it appropriate, may defer prosecution for a period of time, usually one year. Over the course of the year, the defendant is under the supervision of a probation officer. Depending upon the conduct of the defendant, the prosecution will usually dismiss the case at the end of the year.

While it is hard to harness the discretion exercised by prosecutors, the prosecutor can be brought to book in exceptional cases. For ex-

<sup>332</sup> 447 F.2d at 259.  
<sup>333</sup> N.Y. Times, Sept. 27, 1972, at 46, cols. 1, 2.

ample Jim Garrison, District Attorney for the Parish of New Orleans, was brought to book by Clay L. Shaw among others.

Despite the almost conclusive finding of the Warren Commission that Lee Harvey Oswald was President Kennedy's assassin, Garrison had grandiose ideas about a new solution for the murder. As a result of Garrison's ideas, Shaw was tried and acquitted on the heinous charge that he conspired to assassinate President Kennedy. Subsequent to Shaw's acquittal, Garrison immediately, and without any witnesses other than those he used at the trial, charged Shaw with perjury. Shaw went to the federal courts, charging that Garrison had brought the perjury prosecution in bad faith, and obtained injunctive relief permanently barring Garrison from proceeding with the perjury prosecution.<sup>334</sup> Shaw received that relief despite the *Younger v. Harris*<sup>335</sup> line of cases. The Fifth Circuit concluded:

The finding of a bad faith prosecution establishes irreparable injury both great and immediate for purposes of the comity restraints discussed in *Younger*. We conclude that *Younger* presents no bar to the issuance of an injunction.<sup>336</sup>

Two newsmen, Walter Sheridan and Richard Townley, also brought Garrison to book. As news reporters they covered Garrison's alleged investigation into the assassination and participated in the broadcast of a television program critical of his conduct of the investigation. Shortly thereafter, Garrison filed an information that charged Sheridan with bribing a witness, and three informations against Townley for bribing as well as intimidating witnesses. After the filing, but before any trial or hearing on either case had begun, Sheridan and Townley sought injunctive relief in the federal courts. The federal district court denied relief but the Fifth Circuit reversed and ordered an investigatory, evidentiary hearing.<sup>337</sup>

In *United States v. Steele*,<sup>338</sup> the defendant successfully challenged his conviction for refusal to answer census questions on the basis of discriminatory prosecution. Steele was one of only four people in Hawaii who were chosen for prosecution. All four had participated in a census resistance movement, publicizing a dissident view of the census as an unconstitutional invasion of privacy. Steele

334. *Shaw v. Garrison*, 467 F.2d 113 (5th Cir.), *cert. denied*, 409 U.S. 1024 (1972).

335. 401 U.S. 37 (1971).

336. 467 F.2d at 122.

337. *Sheridan v. Garrison*, 415 F.2d 699 (5th Cir. 1969), *rev'g* 273 F. Supp. 673 (E.D. La. 1967), *cert. denied*, 396 U.S. 1040 (1970). For an able answer to the critics of the work of the Warren Commission, see C. ROBERTS, *THE TRUTH ABOUT THE ASSASSINATION* (1967).

338. 461 F.2d 1148 (9th Cir. 1972).

had held a press conference, led a protest march, and distributed pamphlets entitled "Big Brother is Snooping." The Regional Technician for the census in Hawaii described the four as "hard core resisters." The Ninth Circuit held that although mere selectivity in prosecution creates no constitutional problems, discriminatory prosecution does. The court stated:

The principal [is established] that equal protection of the law is denied when state officials enforce a valid statute in a discriminatory fashion. The Due Process Clause of the Fifth Amendment furnishes a federal defendant with the same guarantee against discriminatory federal prosecution. . . . A defendant cannot be convicted if he proves unconstitutional discrimination in the administration of a penal statute.<sup>339</sup>

Comparable situations can arise if the individual can show that the prosecutor proceeded discriminatorily in some way, either against blacks or long-haired youths or persons with unorthodox views. In *Littleton v. Berbling*<sup>340</sup> some blacks and poor people filed a civil rights complaint against two county judges and the state's attorney and his investigator, charging that the judges imposed heavier fines and sentences and higher bail on blacks and the poor than on more affluent whites, and that the state's attorney and his investigator denied to blacks equal access to the criminal justice system. The district court dismissed the complaint but the Seventh Circuit reversed holding that the complaint stated a cause of action. The Supreme Court has granted certiorari and will probably render a decision during its 1973-1974 Term.

Another case involving impermissible selective prosecution is *United States v. Falk*.<sup>341</sup> That case involved an active, vocal draft counselor who alleged that his prosecution for failure to carry a draft card was selective harassment designed to chill the exercise of his first amendment rights. The Seventh Circuit, sitting en banc, vacated the defendant's conviction and remanded the case to the district court, holding that the defendant was entitled to have a hearing on his allegations of discriminatory selective prosecution at which the government would have the burden of proving lack of improper motivation. The court, after reviewing the law and facts and having reached its decision stated:

In conclusion, we wish to note our disapproval of the apparently frequent, and often too easy, practice of simply dismissing all

339. *Id.* at 1151, citing *Yick Wo v. Hopkins*, 118 U.S. 1064 (1886).

340. 468 F.2d 389 (7th Cir. 1972), *cert. granted sub nom. Spoomer v. Littleton*, U.S. \_\_\_\_ (1973).

341. 479 F.2d 1160 (7th Cir. 1973) (en banc).

allegations of illegal discrimination in the enforcement of criminal laws with a reference to *Oyler v. Boles*, [368 U.S. 448 (1962)], and its statement that the conscious exercise of some selectivity in the enforcement of laws does not violate the Constitution. That correct principle does not in many cases answer the question whether selective enforcement in a given case is invidious discrimination which cannot be reconciled with the principles of equal protection.<sup>342</sup>

Although the preceding cases may indicate to the contrary, such charges will usually not prevail. *Linda R. S. v. Richard D.*<sup>343</sup> is illustrative. Texas has a statute which provides that any parent who wilfully refuses to provide for the support of a child under 18 years of age is guilty of a misdemeanor. Linda R. S., the mother of an illegitimate child, went to the local district attorney and asked him to proceed against the father of the child. The district attorney refused to take action for the express reason that in his view the fathers of illegitimate children were not within the scope of this act. She then filed suit in the federal district court on behalf of herself, her child, and others similarly situated, to enjoin such discriminatory application of the Texas statute. A three-judge court was convened, but dismissed the action for want of standing. The Supreme Court affirmed. Justice White, in an opinion in which Justice Douglas joined, argued to the contrary:

Unquestionably, Texas prosecutes fathers of legitimate children on the complaint of the mother asserting nonsupport and refuses to entertain like complaints from a mother of an illegitimate child. I see no basis for saying that the latter mother has no standing to demand that the discrimination be ended, one way or the other.<sup>344</sup>

*United States v. Bland*<sup>345</sup> furnishes another recent example. After the Supreme Court held, in *Kent v. United States*,<sup>346</sup> a case involving a provision of the District of Columbia Juvenile Court Act, that juveniles have due process rights, the Congress sought to circumvent the Court's ruling by excluding from the definition of "child" those 16- and 17-year-olds the United States attorney charged with certain offenses. Congress thus sought to give the United States attorney the discretion to treat these persons either as juveniles or as adults. In

342. *Id.* at 624.

343. 411 U.S. 614 (1973).

344. *Id.* at 621.

345. 472 F.2d 1329 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 909 (1973); *accord*, *Cox v. United States*, 473 F.2d 334 (4th Cir. 1973) (*en banc*).

346. 383 U.S. 541 (1966).

*Bland* the District of Columbia Circuit sustained the provision with the comment that its ruling was in accord with "the long and widely accepted concept of prosecutorial discretion which derives from the constitutional principle of separation of powers."<sup>347</sup> The Supreme Court denied review. However, Justice Douglas, in a dissent in which Justices Brennan and Marshall concurred, pointed out:

The Administrative Procedure Act gives the courts power to review "agency action" and to hold it unlawful, if found to be "contrary to constitutional right, power, privilege, or immunity." This arguably is broad enough to reach the exercise of a prosecutor's discretion in a way that violates the standards of due process laid down in *Kent* and in *Gault*.<sup>348</sup>

### L. Sentencing

Although a judge usually does the sentencing, it is in essence an administrative act. Moreover, some sentencing is done by administrative officials. For instance, in New York, with Class E felonies (where the maximum sentence is four years), if the judge imposes an indeterminate sentence (which has to be at least three years) the state Board of Parole fixes the minimum period of imprisonment.<sup>349</sup> California has a comparable provision.<sup>350</sup>

Today sentencing is usually based on a presentence report. Thus, the report affects a person's liberty and, as a matter of due process, should be available to the defendant or his counsel.

For years the writer has been asking for the presentence reports on his clients as a matter of due process. In the Federal District Courts for the Eastern and Southern Districts of New York, until

347. 472 F.2d at 1335.

348. 412 U.S. at 912 (citations omitted).

For other instances where allegations of discriminatory prosecution did not prevail, *see, e.g.*, *United States v. Ahmad*, 347 F. Supp. 912 (M.D. Pa. 1972) ("Mere failure to prosecute others similarly situated does not constitute a violation of due process or equal protection." *Id.* at 927); *United States v. Malinowski*, 347 F. Supp. 347 (E.D. Pa. 1972) ("It is not all selective enforcement that is forbidden but that which is based on some unjustifiable standard such as race, religion or other arbitrary classification." *Id.* at 353); *United States v. Fletcher*, 344 F. Supp. 332 (E.D. Va. 1972) ("The contention defendant has been denied equal protection under the law because other members of the Armed Forces at Langley who are taken into custody for operating a motor vehicle while under the influence of intoxicants are carried before their Commanding Officer rather than charged under the statute and carried before the Magistrate is without merit." *Id.* at 338); *United States v. Goldstein*, 342 F. Supp. 661 (E.D. N.Y. 1972) ("there is no denial of equal protection of the laws in the selection by IRS or any other government prosecutor, of particular cases for prosecution — at least in the absence of invidious class discrimination." *Id.* at 668).

In *Pugh v. Rainwater*, 355 F. Supp. 1286 (S.D. Fla. 1973), the court invalidated a Florida procedure under which a state attorney could file an information and avoid the requirement of the determination of probable cause by a neutral and detached magistrate as violative of the fourth amendment as well as the due process clause of the fourteenth amendment.

349. N.Y. PENAL LAW § 70.00 (McKinney 1967).

350. *See* CAL. PENAL CODE § 3020 (West 1970).

recently, he never received them. In other federal district courts, he invariably did.

As late as June 1972, in *United States v. Brown*,<sup>351</sup> in response to defense counsel's request for the disclosure of the presentence report, District Judge Walter Bruchhausen of the Eastern District of New York declared, "Well it is not the policy of the Court to disclose pre-sentence reports . . . It has never been done in all my time in the courtroom that I can recall."<sup>352</sup> The Second Circuit, in reversing Judge Bruchhausen and remanding the case for reconsideration and resentencing by another judge, had this footnote to Judge Bruchhausen's statement:

Appellant argues that the judge mistakenly believed there was a uniform policy of non-disclosure in the Eastern District of New York. We construe the judge's remarks as referring only to his own policy. If there were such a uniform district practice — and we have no reason to believe that there is — it would be an even more egregious violation of the spirit of the Rule.<sup>353</sup>

However, the writer can corroborate Judge Bruchhausen's statement: as noted, until recently the judges in the Eastern and Southern Districts of New York never disclosed to him the presentence reports on his clients.

Indeed, until 1966 the Federal Rules of Criminal Procedure contained no provision for the disclosure of the presentence report. A 1966 amendment to rule 32(c)(2) provides:

The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.<sup>354</sup>

One will note that the matter of disclosure is still within the discretion of the trial judge. The amendment provides that the judge before imposing sentence "may disclose," not that he must.

Parole boards, in the instances where they impose minimum sentences, display even less inclination than trial judges to disclose the reasons or bases for their determinations. Let us take the case of one of the writer's clients, Otis Massey, to whom the trial judge in New York gave an indeterminate sentence with a maximum of four years.

351. 470 F.2d 285 (2d Cir. 1972).

352. As quoted in *id.* at 287 (emphasis omitted).

353. *Id.* at 288 n.4.

354. FED. R. CRIM. P. 32(c)(2) (1970).



Under date of August 2, 1972, the writer sent a letter to Paul J. Regan, Chairman of the New York State Board of Parole, advising him that he represented Mr. and Mrs. Otis Massey and offering on their behalf:

I would like to meet with the Parole Board in Albany and have with me Mrs. Massey as well as two of their eight children who are over the age of 14 — Harold who is 17 and Gail who is 16. At that time I would like to present to the Board additional information as well as certain letters on behalf of Mr. Massey which I think will have a significant bearing on his parole. I feel that a review of the situation and a consideration of the additional material that I plan to call to the Board's attention will be encouraging for Mr. Massey and for his family.<sup>355</sup>

Under date of September 13, 1972, Mr. Regan replied, a letter the writer quotes in full except for the salutation and the closing:

I regretfully have been delayed in replying to your letters of August 2, August 16 and September 6, in behalf of Mr. Massey. According to the records, Otis Massey was convicted and sentenced by the Honorable David O. Boehm to two concurrent terms of four years for promoting gambling in the first degree and possession of gambling records in the first degree. Since the Court did not impose a minimum but only a maximum sentence, it is the responsibility of the Board of Parole to determine a minimum period of imprisonment. This the Board did in August, 1972, holding Mr. Massey one year and four months, allowing for time already confined and, thus, setting his hearing for possible parole in January of 1973. This appearance is in accord with legal requirements and the question of release on parole is [*sic*] not taken up by the Board at his hearing in August, 1972.

Mr. Massey's record in the institution was available to the Board, as well as information concerning his offense and background and a personal interview was conducted with him by the Parole Board. Following this, the Board's decision was determined after a careful evaluation of all factors in the case.

I do not feel it is necessary for Mrs. Massey and her children to travel to Albany, New York, inasmuch as information relating to the personal and family history was already a part of the case record and available to the Board members at the minimum period of imprisonment hearing. However, if you feel that Mr. Massey or his immediate family have any additional information, they can forward this to my attention and I would be only too glad to carefully review all the facts in his case. It should be understood that this is not a guarantee that favorable action will be taken by the Board.

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<sup>355</sup> Letter from O. John Rogge to Paul J. Regan, Aug. 2, 1972.

The letters from Reverend Young, Mr. Willie C. Brown and the employment offer from Mr. Ephraim J. Kauffman, will be placed in Mr. Massey's record so that they will be available to the members of the Board of Parole before whom he will appear at the time of parole consideration.<sup>356</sup>

The Board of Parole wanted no further help from the prisoner's counsel, either for fixing the minimum period of imprisonment or for release on parole.

However, in the courts there has been a change for the better. *United States v. Brown*,<sup>357</sup> referred to previously, provides an illustration. That case concerned the sentencing of a young black teacher and writer who refused to fight in the Vietnam War. Remanding the case to a different judge for reconsideration and resentencing, the Second Circuit stated:

When the Federal Rules of Criminal Procedure were amended in 1966 to provide . . . that the sentencing court "may disclose" the pre-sentence report, it certainly was intended that the sentencing court exercise its discretion in each case. It is equally clear that when a judge states, as he did here, that in effect his policy is never to disclose pre-sentence reports, that is not an exercise of discretion on an individual basis. . . . Moreover, we have pointed out that the preferable practice, absent circumstances calling for confidentiality, is to disclose to the defendant or his counsel at least the substance of the pre-sentence report.<sup>358</sup>

Other federal cases illustrate the recent trend. In *United States v. Janiec*,<sup>359</sup> a case in which the trial court had denied the defendant's motion for disclosure of presentence reports, the Third Circuit concluded:

[T]he list of prior convictions, contained in the presentence report, *must be disclosed*, when requested by the defendant or his counsel unless the district court does not rely in any way upon a defendant's prior convictions. We believe that this conclusion is constitutionally required.<sup>360</sup>

A few years earlier the Fourth Circuit, in *Baker v. United States*,<sup>361</sup> while acknowledging the permissive nature of rule 32(c)(2), nevertheless reached the same result, saying:

Admittedly there are items in the report of which the defendant is rightfully entitled to be advised. The sentencing court

356. Letter from Paul J. Regan to O. John Rogge, Sept. 13, 1972.

357. 470 F.2d 285 (2d Cir. 1972). See text accompanying note 351 *supra*.

358. *Id.* at 285, 287-88.

359. 464 F.2d 126 (3d Cir. 1972).

360. *Id.* at 127.

should apprise him, orally from the bench, of at least such pivotal matters of public record as the convictions and charges of crime, with date and place, attributed to him in the report. As this may be done without handing the defendant or counsel the report, the procedure could not lead to a destruction of the probation officer's sources of information.<sup>362</sup>

However, even those courts which require at least partial disclosure of the presentence report make an exception for the ubiquitous confidential informant. The Fourth Circuit in *Baker* went so far as to say that the disclosure of the presentence report with its consequent revelation of confidential informants could defeat the object of the report.<sup>363</sup>

The concept that a confidential informant must be protected is widespread; the writer has always challenged it. If one person has made a statement about another upon which that other's life, liberty, or property depends at least in part, then the person making the statement should be subject to taking the witness stand for examination and cross-examination. If such a requirement were adopted there would be less talebearing.

Originally, the drafters of the 1966 amendments to the Federal Rules of Criminal Procedure made disclosure of the presentence report mandatory. The Advisory Committee's note explains why it reversed itself:

Substantial objections to compelling disclosure in every case have been advanced by federal judges, including many who in practice often disclose all or parts of presentence reports. Hence, the amendment goes no further than to make it clear that courts may disclose all or part of the presentence report to the defendant or to his counsel. It is hoped that courts will make increasing use of their discretion to disclose so that defendants generally may be given full opportunity to rebut or explain facts in presentence reports which will be material factors in determining sentences.<sup>364</sup>

However, in its 1970 proposals, the Advisory Committee abandoned its unsuccessful experiment with discretionary disclosure and moved forward to a position favoring mandatory disclosure, with an exception, of course, for the confidential informant.<sup>365</sup> The Advisory Committee's note to the proposed amendment states:

362. *Id.* at 933.

363. *Id.*

364. Quoted in 8A J. MOORE, FEDERAL PRACTICE ¶ 32.03[4] (2d ed. 1973) (citation omitted).

365. The proposed rule is set forth in *id.* at 32-39 to 32-40, n.32.21.

In recent years, three prestigious organizations have recommended that the report be disclosed to the defense. See American Bar Association, Standards Relating to Sentencing Alternatives and Procedures § 4.4 (Approved Draft, 1968); American Law Institute, Model Penal Code § 7.07(5) (P.O.D. 1962); National Council on Crime and Delinquency, Model Sentencing Act § 4 (1963). This is also the recommendation of the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967). . . .<sup>366</sup>

The courts of other jurisdictions have been more generous than the federal courts in making presentence reports available to the defendant or his counsel. In England,<sup>367</sup> California,<sup>368</sup> and New Jersey,<sup>369</sup> when a conviction has been for a serious crime, the report must be fully disclosed and counsel must be given an opportunity to rebut its contents. In Virginia the report must be presented in open court with the defendant being apprised of its content and having a right to cross-examine the one who prepared it.<sup>370</sup> In Connecticut the defendant is furnished the report but the court's discretion determines the limits of the defense's rights to interrogate the investigator who prepared it.<sup>371</sup> In Minnesota,<sup>372</sup> Maryland,<sup>373</sup> and North Carolina,<sup>374</sup>

366. Quoted in *id.* at 32-40 n.32.21.

For other recent federal cases on the disclosure issue, see *United States v. Schrenzel*, 462 F.2d 765 (8th Cir.), *cert. denied*, 409 U.S. 984 (1972) (disclosure of the presentence report within the discretion of the trial judge); *United States v. Stidham*, 459 F.2d 297 (10th Cir. 1972) ("We have held that it is not a violation of due process to deny a defendant's request to see the presentence report." *Id.* at 299); *United States v. McKinney*, 450 F.2d 943 (4th Cir. 1971); *United States v. Knupp*, 448 F.2d 412 (4th Cir. 1971), and *United States v. Dockery*, 447 F.2d 1178 (D.C. Cir. 1971) (disclosure of the presentence report is within the discretionary authority of the trial judge). In *Dockery*, Circuit Judge J. Skelly Wright wrote a forceful dissent which concluded:

The time has come, indeed it is long past, to recognize that "guilty" individuals deserve fundamentally fair treatment, just as do those we presume innocent. We must forcefully and finally reject "the ancient view that a convicted defendant becomes an outlaw, a person with no legal rights whose property and even identity may be forfeit." So too must we reject the more modern paternalistic assumption that the "guilty" are mere social problems to be solved rather than individuals to be treated fairly. The trend of law and opinion, I believe, is to recognize and protect the rights of criminal convicts, whether in the procedures by which they are sent to and released from prison or in the conditions which they must endure while incarcerated. A guarantee of fairness and accuracy at the sentencing hearing is a good place to begin.

447 F.2d at 1200-01.

367. Criminal Justice Act of 1948, 11 & 12 Geo. 6, c. 58, § 43.

368. CAL. PENAL CODE § 1203 (West 1970).

369. See *New Jersey v. Kunz*, 55 N.J. 128, 144-45, 259 A.2d 895, 903-04 (1969).

370. VA. CODE ANN. § 53-278.1 (1972).

371. See *Connecticut v. Harmon*, 147 Conn. 125, 129, 157 A.2d 594, 596 (1960).

372. MINN. STAT. ANN. § 609.115(4) (1964).

373. See MD. RULES OF PROC., Rule 761(c) and *Driver v. Maryland*, 201 Md. 25, 32, 92 A.2d 570, 573-74 (1952).

374. See N.C. GEN. STAT. § 15-207 (1965) and *North Carolina v. Pope*, 257 N.C. 326, 331, 126 S.E.2d 126, 132-33 (1962).

the substance of the report must be disclosed, although provision is made to safeguard from disclosure the sources of information it contains.

Recently the highest courts of two jurisdictions, Arizona and Pennsylvania adopted section 4.4 of the American Bar Association's Standards Relating to Sentencing Alternatives and Procedures and thus added their voices to those calling for the disclosure of the presentence report.<sup>375</sup> Section 4.4(a) provides:

*Fundamental fairness* to the defendant requires that the substance of all derogatory information which adversely affects his interests and which has not otherwise been disclosed in open court should be called to the attention of the defendant, his attorney, and others who are acting on his behalf.<sup>376</sup>

Some day, hopefully, there will be a due process right to the disclosure of a presentence report to the defendant and his counsel.

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375. *State v. Pierce*, 108 Ariz. 174, 494 P.2d 696 (1972); *Commonwealth v. Phelps*, 450 Pa. 597, 301 A.2d 678 (1973).

376. ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 4.4(a) (Approved Draft 1968) (emphasis added).

APPENDIX

I. Recent cases involving teachers.

Hetrick v. Martin, 480 F.2d 705 (6th Cir. 1973) (state university's refusal to renew nontenured teacher's contract because it considered her teaching philosophy to be incompatible with its pedagogical aims held not violative of first amendment rights) *petition for cert. filed*, 42 U.S.L.W. 3151 (U.S. Sept. 11, 1973) (No. 73-470); Thompson v. Madison County Bd. of Educ., 476 F.2d 676 (5th Cir. 1973) (allegation of racial discrimination in school board's refusal to rehire held to entitle teachers to full evidential hearing in the district court); Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973) ("we do not conceive academic freedom to be a license for uncontrolled expression at variance with established curricular contents and internally destructive of the proper functioning of the institution" *id.* at 931); Stolberg v. Members of the Bd. of Trustees, 474 F.2d 485 (2d Cir. 1973) (faculty member discharged for exercise of first amendment rights entitled to reinstatement with tenure without loss of seniority and damages for intervening salary loss plus reasonable attorney's fees); Calvin v. Rupp, 471 F.2d 1346 (8th Cir. 1973) (teacher whose notice of reemployment was revoked was accorded due process); Simard v. Board of Educ., 473 F.2d 988 (2d Cir. 1973), Kota v. Little, 473 F.2d 1 (4th Cir. 1973), and Patrone v. Howland Local Schools Bd., 472 F.2d 159 (6th Cir. 1972) (nontenured teachers accorded due process); George v. Conneaut Bd. of Educ., 472 F.2d 132 (6th Cir. 1972) (summary judgment not proper in case of nontenured teacher when the record presented a genuine question as to whether the board's failure to renew his contract was due to his exercise of first amendment rights); Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972) (teacher, nontenured but continuously employed for 29 years, entitled to notice and a hearing); Russo v. Central School Dist., 469 F.2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973) (violation of first amendment rights to dismiss probationary teacher for standing silently at attention during daily classroom recitation of the Pledge of Allegiance); Lewis v. Spencer, 468 F.2d 553 (5th Cir. 1972) (wife half of a husband and wife teaching team entitled to a hearing on claim that action against her was in retaliation for her exercise of first amendment rights); Chitwood v. Feaster, 468 F.2d 359 (4th Cir. 1972) (nontenured teachers entitled to a hearing on claim that the nonrenewal of their contracts was in retaliation for conduct protected by the first and fourteenth amendments); Toney v. Reagan, 467 F.2d 953 (9th Cir. 1972), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_ (1973) (state administrative remedy to be first exhausted); Rozman v. Elliott, 467 F.2d 1145 (8th Cir. 1972) (nontenured associate professor's action in occupation of R.O.T.C. building, contribution to cancellation of a class, and defiance of university president's order held valid grounds for dismissal, outside the protection of the first amendment); Lukac v. Acocks, 466 F.2d 577 (6th Cir. 1972) (nontenured football coach not entitled to know the reason for nonrenewal nor to a hearing); Cook County College Teachers v. Byrd, 456 F.2d 882 (7th Cir.), *cert. denied*, 409 U.S. 848 (1972) (plaintiffs' burden of proving that nonretention of probationary college teachers resulted from antinunion bias not sustained); Cooley v. Board of Educ., 453 F.2d 282 (8th Cir. 1972) (summary midterm dismissal held to deprive teacher of procedural due process); Cornist v. Richland Parish School Bd., 448 F.2d 594 (5th Cir. 1971) (summarily dismissed tenured public school teacher held entitled to relief under the Civil Rights Act); Mailloux v. Kiley, 448 F.2d 1242 (1st Cir. 1971) (statement in Code of Ethics of Education Profession held impermissibly vague and not sufficient to justify a post facto decision that use of a particular teaching method was grounds for dismissal); Orr v. Trinter, 444 F.2d 128 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972) (nontenured public school teacher not entitled to statement of reasons for school board's refusal to renew his contract nor to a hearing); Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970) (teacher with expectancy of reemployment held entitled to a statement of reasons for termination and, if reasons for termination involved a possible collision with first amendment rights, a hearing).

Francis v. Ota, 356 F. Supp. 1029 (D. Hawaii 1973) (failure to follow established procedures for granting tenure violated due process); Doherty v. Wilson, 356 F. Supp. 35 (M.D. Ga. 1973) (school board's refusal to employ teacher because of her residence on a communal farm violated constitutionally protected right of free association); Hajduk v. Vocational Tech. & Adult Educ. Dist., 356 F. Supp. 33 (E.D. Wis. 1973) (on a motion to dismiss, allegation that the actual reason for nonretention of a nontenured public school teacher was the teacher's criticism of the board of education held to state a valid legal basis for action); Burton

v. Cascade School Dist., 353 F. Supp. 254 (D. Ore. 1973) (Oregon statute that permitted local school boards to dismiss teachers for "immorality" held unconstitutionally vague); Bhargave v. Cloer, 355 F. Supp. 1143 (N.D. Ga. 1972) (probationary teacher entitled to a due process hearing prior to the termination of her contract in the middle of a school year); Starsky v. Williams, 353 F. Supp. 900 (D. Ariz. 1972) (summary judgment for teacher because the court concluded that the primary reason for action taken against him was grounded in his exercise of first amendment rights in expressing unpopular views); Olson v. Trustees of Cal. State Univ., 351 F. Supp. 430 (C.D. Cal. 1972) (failure to promote an assistant professor to full professor held to violate no constitutionally protected right); United States v. Nansemond County School Bd., 351 F. Supp. 196 (E.D. Va. 1972) in the absence of showing any connection between the desegregation of the school system and dismissals of teachers, the dismissed teachers' proof that the system had been recently desegregated and that they were discharged did not shift the burden to the school board to justify its action); Shumate v. Board of Educ., 350 F. Supp. 1315 (S.D. W. Va. 1972) (failure to reemploy probationary high school teacher held not actionable); Scheelhaase v. Woodbury Cent. Com. School Dist., 349 F. Supp. 988 (N.D. Iowa 1972) (nonrenewal of Iowa teacher's contract on ground of professional incompetence as indicated by low scholastic accomplishments of students on specified tests held arbitrary and capricious); Kennedy v. Engel, 348 F. Supp. 1142 (E.D.N.Y. 1972) (assistant professor at United States Merchant Marine Academy held to have no legitimate claim to tenure and no basis for a claim of entitlement to tenure which would entitle him to a due process hearing by the Tenure Committee); Gassin v. Haskey, 348 F. Supp. 689 (E.D. Mo. 1972) (public school teacher without tenure or a reasonable expectation of reemployment held to have no right to a hearing on her objections to reassignment when the evidence showed her allegations of impermissible racial motivation to be unfounded); Lawrence v. Barker, 347 F. Supp. 588 (E.D. Tex. 1972) (procedure followed by school district accorded nontenured teacher due process and teacher's prayer for relief was denied); Oliver v. Kalamazoo Bd. of Educ., 346 F. Supp. 766 (W.D. Mich. 1972) (school board enjoined from dismissal of any teacher when such dismissal would reduce the racial balance in the faculty and infringe on fourteenth amendment rights); Appler v. Mountain Pine School Dist., 342 F. Supp. 1131 (W.D. Ark. 1972) (failure to accord hearing required by an Arkansas act violative of due process); Boyce v. Alexis I. duPont School Dist., 341 F. Supp. 678 (D. Del. 1972) (nontenured teacher accorded due process — on the facts, held that the failure to reemploy teacher violated neither fourteenth amendment due process nor first amendment freedom of speech); Schreiber v. Joint School Dist., 335 F. Supp. 745 (E.D. Wis. 1972) (teacher dismissed during the course of her one-year employment held entitled to a statement of the reasons and a hearing); Cochran v. Odell, 334 F. Supp. 555 (N.D. Tex. 1971) (probationary teacher not entitled to pretermination hearing); Bates v. Hinds, 334 F. Supp. 528 (N.D. Tex. 1971) (nontenured teacher threatened with termination during his contractual term held to have the same right to hearing as a tenured teacher threatened with nonrenewal of his contract); Shields v. Watrel, 333 F. Supp. 260 (W.D. Pa. 1971) (nontenured teacher not entitled to pretermination hearing); Jinks v. Mays, 332 F. Supp. 254 (N.D. Ga. 1971), *modified on other grounds*, 464 F.2d 1223 (5th Cir. 1972) (policy of board of education in denying maternity leave to nontenured teachers while granting it to tenured teachers constituted a violation of equal protection); Auerbach v. Trustees of Cal. State Colleges, 330 F. Supp. 808 (C.D. Cal. 1971) (professor not accorded tenure entitled to statement of reasons and a hearing); Chase v. Fall Mountain Regional School Dist., 330 F. Supp. 388 (D.N.H. 1971) (nontenured teacher protected from arbitrary, discriminating, or capricious nonrenewal).

In *Acanfora v. Montgomery County Bd. of Educ.*, 359 F. Supp. 843 (D. Md. 1973), the court expressed the view that a school board's policy of refusing to hire homosexuals as teachers infringed upon their constitutionally protected right to engage in private, consensual, adult homosexuality.

In *Moore v. Gaston County Bd. of Educ.*, 357 F. Supp. 1037 (W.D.N.C. 1973), the court, in giving relief to a student teacher who was dismissed for having responded to students' questions with answers approving Darwinian theory, indicating personal agnosticism, and questioning the literal interpretation of the Bible, wrote: "To discharge a teacher without warning because his answers to scientific and theological questions do not fit the notion of the local parents and teachers is a violation of the Establishment clause of the First Amendment." *Id.* at 1043.

In *Purifoy v. State Bd. of Educ.*, 30 Cal. App. 3d 187, \_\_\_\_ P.2d \_\_\_\_, 106 Cal. Rptr. 201 (1973), the court sustained the validity of a California statute providing for the automatic suspension of the credentials of any teacher who had been convicted of a sex offense.

In *Webb v. Lake Mills Com. School Dist.*, 344 F. Supp. 791 (N.D. Iowa 1972) the court held that a high school drama coach, who had been dismissed after staging a play which contained the words "damn" and "son of a bitch" even though they were watered down to "darn" and "son of a biscuit" for public performances, was entitled to reinstatement and back pay. Granting that relief, the Court noted:

With respect to the academic freedom of teachers of high school students of the age of those involved in the instant case, federal courts dealing with the subject have upheld two kinds of academic freedom: the substantive right of a teacher to choose a teaching method which in the court's view served a demonstrated educational purpose; and the procedural right of a teacher not to be discharged for the use of a teaching method which was not proscribed by a regulation, and as to which it was not shown that the teacher should have had notice that its use was prohibited.

*Id.* at 799.

## II. Recent cases involving public employees.

*Stradley v. Anderson*, 478 F.2d 188 (8th Cir. 1973) (police department hair length regulation held constitutional); *Mancuso v. Taft*, 476 F.2d 187 (1st Cir. 1973) (city home rule charter provision prohibiting "continuing in the classified service of the city after becoming a candidate for nomination or election to any public office" invalidated on the grounds that the right to run for public office is based upon freedom of individual expression and freedom of association); *Wood v. United States Post Office Dep't*, 472 F.2d 96 (7th Cir.), *cert. denied*, 412 U.S. 939 (1973) (reversing lower court order of reinstatement on the grounds that the lower court erred in requiring that the dismissal be supported by substantial evidence since a court should order reinstatement of a government employee only if the discharge is not supportable on any rational basis); *Cole v. Choctaw County Bd. of Educ.*, 471 F.2d 77 (5th Cir.), *cert. denied*, 411 U.S. 948 (1973) (discharge of black school bus driver because she discussed racial segregation with the F.B.I. and actively supported a school boycott held constitutionally impermissible); *Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973) (affirming lower court's judgment in favor of a chaplain at a state mental hospital who had been discharged on the grounds that society's interest in "uninhibited and robust debate" on such matters of public concern as mental health care, combined with the individual's freedom of speech, outweighed the interests of the state as employer); *Diles v. Woolsey*, 468 F.2d 614 (8th Cir. 1972) (workmen's compensation referee who had served in that position for 15 years held not entitled to a statement of reasons or a hearing upon dismissal since his status was that of a nontenured state employee); *Harnett v. Ulett*, 466 F.2d 113 (8th Cir. 1972) (probationary social worker at state hospital not entitled to pretermination hearing); *Fisher v. Walker*, 464 F.2d 1147 (10th Cir. 1972) (fireman's suspension for five days did not violate his first amendment rights); *Murray v. Kunzig*, 462 F.2d 871 (D.C. Cir. 1972), *cert. granted*, 410 U.S. 981 (1973) (interim injunctive relief granted probationary employee who charged that agency did not follow its own regulations); *McDowell v. Texas*, 465 F.2d 1342, (5th Cir. 1971) (discharge of school superintendent not violative of either substantive or procedural due process); *Birnbaum v. Trussell*, 371 F.2d 672 (2d Cir. 1966) (doctor discharged from job as part-time attending physician at a municipal hospital because of an alleged anti-black bias entitled to pretermination notice and hearing).

*Pennsylvania ex rel. Rafferty v. Philadelphia Psychiatric Center*, 356 F. Supp. 500 (E.D. Pa. 1973) (discharge of nurse infringed rights guaranteed her under the first amendment since she was fired solely because of her published statements in the *Philadelphia Daily News*); *Sayah v. United States*, 355 F. Supp. 1008 (C.D. Cal. 1973) (probationary employee of a federal agency has no property interest in continued employment); *Abbott v. Thetford*, 354 F. Supp. 1280 (M.D. Ala. 1973) (chief probation officer who brought suit as next friend for certain minors in violation of a departmental order was properly discharged); *Bean v. Darr*, 354 F. Supp. 1157 (M.D.N.C. 1973) (dismissal of a sanitation employee did not violate first amendment because employee's "vociferous expression" of ideas was aimed at the disruption of harmony and insubordination to his superiors).



and was, therefore, not constitutionally protected speech); *Heaphy v. United States Treasury Dep't*, 364 F. Supp. 396 (S.D.N.Y. 1973) (federal probationary employee held properly discharged); *Monti v. Flaherty*, 351 F. Supp. 1136 (W.D. Pa. 1972) (dismissal of city policeman for failure to comply with residence requirement but without affording him a hearing violated due process); *Jones v. Kelly*, 347 F. Supp. 1260 (E.D. Va. 1972) (court-appointed children's supervisor in city Juvenile Detention Home had no right to pretermination hearing) ("Public employees serving, as in the instant case, at the will and pleasure of a municipality or an officer thereof, are subject to summary discharge with or without cause, so long as such discharge is not in retribution for an exercise of some constitutionally protected right." *Id.* at 1263); *Martin v. Conlisk*, 347 F. Supp. 262 (N.D. Ill. 1972) (certificate of appointment as a special policeman could not be revoked without notice and a hearing); *Richardson v. Hampton*, 345 F. Supp. 600 (D.D.C. 1972) (Civil Service Commission may, "consonant with the First Amendment," refuse to consider an application until the applicant furnishes information relating to his homosexuality as required by established Commission policy); *Harrington v. Taft*, 339 F. Supp. 670 (D.R.I. 1972) (probationary police officer entitled to a written, detailed statement of the reasons for his dismissal and to access to all administrative reports in which his performance as a policeman was evaluated); *Hunter v. City of Ann Arbor*, 325 F. Supp. 847 (E.D. Mich. 1971) (assistant director of city's Department of Human Rights entitled to a hearing prior to discharge despite contention that power of summary dismissal was required to maintain relationship of trust between department heads and their immediate subordinates); *Newcomer v. Coleman*, 323 F. Supp. 1363 (D. Conn. 1970) (public housing director could not be discharged without notice of the charges and a full and fair hearing); *Bogacki v. Board of Supervisors*, 5 Cal. 3d 771, 489 P.2d 537, 97 Cal. Rptr. 657 (1971) (public employee serving at the pleasure of the appointing authority may be dismissed at will); *Moore v. Board of Trustees*, 88 Nev. Adv. Op. 55, 495 P.2d 605, *cert. denied*, 409 U.S. 879 (1972) (governing body of public hospital, after notice and hearing, properly terminated doctor's medical staff privileges for unprofessional conduct).

The Ninth Circuit ruled, in *Sherar v. Cullen*, 481 F.2d 945 (9th Cir. 1973), that a revenue agent's dismissal for refusing to furnish records for a personal tax audit without a prior determination of his claim that the audit was an unreasonable search constituted a violation of his constitutional rights.

In *Sugarman v. Dougall*, 93 S. Ct. 2842 (1973), the Court held that section 53 of the New York Civil Service Law, which restricted permanent positions in the competitive class of the state civil service to United States citizens, violated the fourteenth amendment's equal protection clause.

The Florida Supreme Court, in *Swinney v. Untreiner*, 272 So.2d 805 (Fla.), *cert. denied*, 93 S. Ct. 3064 (1973), sustained the validity of a Florida statute which curtailed political activities of a person holding an office or place in the classified service on penalty of dismissal.

In *Illinois State Employees v. Lewis*, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 943 (1973), the Seventh Circuit held that the dismissal of a non-civil service state employee for failure to support the partisan political views of his immediate superior violated the first amendment. The court wrote, "It is now axiomatic 'that the state and federal governments . . . do not constitutionally have the complete freedom of action enjoyed by a private employer.'" *Id.* at 575.

The New York Court of Appeals, in *Sanford v. Rockefeller*, 32 N.Y.2d 788, 337 N.Y.S.2d 688, 298 N.E.2d 681 (1973), *appeal filed sub nom.* *Collins v. Rockefeller*, 42 U.S.L.W. 3075 (U.S. July 26, 1973), decided that the procedures set forth in section 210 of the New York Civil Service Law, often referred to as the Taylor Act, seeking to outlaw strikes by public employees, constituted sufficient due process.

### III. Recent cases involving students.

*Baughman v. Freienmuth*, 478 F.2d 1345 (4th Cir. 1973) (school board regulation that required principal's review and approval of student publications but provided neither a time limit within which the principal must act nor a method of review of his decision constituted an unreasonable restriction of the first amendment rights of students); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973) (predominantly black state university president's withdrawal of financial support from official student newspaper, which had a segregationist editorial policy, abridged freedom of the press in violation of the first amendment); *Karp v. Becken*, 477 F.2d 171 (9th

Cir. 1973) (5-day suspension of a high school student because of his role in the distribution of protest signs invalidated due to the protected nature of the activity and the school's failure to meet its burden of justification); *Bazaar v. Fortune*, 476 F.2d 570 (5th Cir. 1973) (University of Mississippi ordered not to interfere with the publication and distribution of *Images*, a student publication which employed four-letter words); *Sullivan v. Houston Independent School Dist.*, 475 F.2d 1071 (5th Cir. 1973) (procedures under which high school student was suspended prior to a hearing held to have accorded him due process); *Black Students v. Williams*, 470 F.2d 957 (5th Cir. 1972) (public school student may not be suspended for 10 days without a prior hearing); *Pervis v. LaMarque Independent School Dist.*, 466 F.2d 1054 (5th Cir. 1972) (in a suspension case, subsequent hearing does not cure the initial deprivation of due process); *Betts v. Board of Educ.*, 466 F.2d 629 (7th Cir. 1972) (high school student who admitted the misconduct with which she was charged — setting false fire alarms — held to have been accorded due process; the admission rendered a hearing prior to her transfer not essential); *Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972), *cert. denied*, 411 U.S. 951 (1973) (high school principal's suspension of student wearing Confederate flag emblem in school previously disrupted by racial polarization sustained); *Linwood v. Board of Educ.*, 463 F.2d 763 (7th Cir. 1972) (Illinois procedure for suspension and expulsion of students held to meet due process requirement); *Sill v. Pennsylvania State Univ.*, 462 F.2d 463 (3d Cir. 1972) (submission of charges against university students to a special disciplinary panel did not deprive the students of due process nor were the regulations under which they were charged and disciplined unconstitutionally vague and overbroad); *Winnick v. Manning*, 460 F.2d 545 (2d Cir. 1972) (suspension of student held valid — his allegation that the decision maker, the associate dean of students, was biased was unfounded); *Williams v. Dade County School Bd.*, 441 F.2d 299 (5th Cir. 1971) (superintendent's 30-day suspension of a student without benefit of a hearing violated due process).

*Vail v. Board of Educ.*, 354 F. Supp. 592 (D.N.H. 1973) (defendants enjoined from enforcing regulation prohibiting the distribution of nonschool sponsored written materials on school grounds, and suspensions for the distribution of such materials on school grounds voided); *Boyd v. Smith*, 353 F. Supp. 844 (N.D. Ind. 1973) (suspended student must first exhaust administrative remedies); *Fielder v. Board of Educ.*, 346 F. Supp. 722 (D. Neb. 1972) ("due process in student expulsion cases, wherein there is no clear urgency for acting prior to a hearing, demands at least (1) a notice of the reasons advanced for the proposed expulsion, and (2) a hearing (a) held sufficiently after the giving of the notice to enable the student to prepare to respond to the reasons given, (b) at which the factual bases for those reasons can be refuted, if the student is able to refute them, and (c) at which cross-examination can be conducted of the person or persons primarily aware of the reasons being leveled for the proposed expulsion. *Id.* at 730); *DeJesus v. Penberthy*, 344 F. Supp. 70 (D. Conn. 1972) (expulsion based on hearsay constituted a denial of due process).